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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN A. KNOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing.

II. Where no other prosecution has ever been brought and no other arrest has ever been made charging an exhibition of the genitals which were fully covered by an article of clothing, and the defendant knew that the videotape contained no nudity and was told that the videotape was therefore legal, did the government introduce sufficient proof of *scienter* to support a guilty verdict?

III. Where no other prosecution has ever been brought and no other arrest has ever been made charging an exhibition of the genitals which were fully covered by an article of clothing, is an objectively reasonable good faith belief in the legality of the depiction a valid affirmative defense?

IV. Assuming *arguendo* that there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by clothing, is 18 U.S.C. § 2256(2)(E) unconstitutionally vague and overbroad?

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In the Supreme Court of the United States

--- Term, 1992

No.

STEPHEN A. KNOX, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported in *United States v. Knox*, 977 F.2d 815 (3d Cir. 1992) and is reproduced in the Appendix to this petition. PA 1-25.[1] The opinion of the district court denying Knox's pretrial motion is reported at 776 F. Supp. 174 (M.D. Penn. 1991).

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[1]"PA" is Appendix to this Petition for Certiorari. (A is a citation to the Appendix filed in the Third Circuit.)

JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment on October 15, 1992, affirming petitioner Stephen A. Knox's conviction for receipt and possession of child pornography as proscribed by 18 U.S.C. § 2252 *et seq.* This petition for a writ of certiorari was filed within ninety (90) days of judgment by the Third Circuit. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, § 2252(a)(2)[2] and (a)(4)(B) provide in pertinent part:

> (a) Any person who --
>
> (2) knowingly receives ... any visual depiction that has been mailed ... in interstate or foreign commerce, or which contains materials which have been mailed ... if --
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;
>
> (4) either --
>
> (B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed ... in interstate or foreign commerce, or which was produced using materials which have been mailed ... if --
>
> (i) the producing of such visual depiction involves the use of a minor engaging in sexually

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[2]This statute was recently held to be unconstitutional on its face *United States v. Gottesman*, ___ F.2d ___, 1992 WL 367097 (9th Cir. decided December 16, 1992).

explicit conduct; and

(ii) such visual depiction is of such conduct:

shall be punished as provided in subsection (b) of this section.

Title 18, United States Code, § 2256(2) provides in pertinent part:

For the purposes of this chapter, the term --

(2) "sexually explicit conduct" means actual or simulated --

(A) sexual intercourse ...;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Stephen A. Knox was convicted on one count of receiving depictions of minors engaged in "sexually explicit conduct" under 18 U.S.C. § 2252(a)(2) and § 2256(2)(E) and one count of possessing three or more items containing a depiction of minors engaged in "sexually explicit conduct" under 18 U.S.C. § 2252(a)(4)(B) and § 2256(2)(E), based solely on three videotapes containing videotaped sequences sold by a Nevada-based company, Nather, Inc. ("Nather").

Although none of the minors depicted in the videotapes were shown to be engaged in any actual or simulated sexual conduct and all genitals were fully covered, the district court agreed to decide -- and then denied -- a pretrial motion to dismiss based upon the contents of the

videotapes. The underpinning of the district court's denial was a finding that the uppermost portion of the inner thigh was the "pubic area". Since the pubic area was exposed (nude), the district court reasoned, a prosecution based on an exhibition of the pubic area -- not the genitals -- was statutorily authorized:

> Although in every instance the girl's genitals were covered by either underpants or a bathing suit, the area in close proximity to the genitals, specifically the uppermost portion of the inner thigh area closest to the girl's genitals, were clearly exposed.

United States v. Knox, *supra*, 776 F. Supp. at 180.

At a subsequent bench trial, the trial judge found that the "exhibitions" were "lascivious" and had been received by Knox in the mails. Knox was convicted and, on February 13, 1992, sentenced to the mandatory minimum sentence of five (5) years imprisonment.

On October 15, 1992, the Third Circuit found the district court in error because "[d]isplaying any portion of the inner thighs does not constitute an exhibition of the pubic area under 18 U.S.C. § 2256(2)(E)." *United States v. Knox*, *supra*, 977 F.2d at 819-820. (PA 9). However, the Third Circuit affirmed Knox's conviction, holding that displaying *fully covered* genitals *does* constitute an "exhibition" under 18 U.S.C. § 2256(2)(E).

B. Statement of Facts

1. The Defendant

Petitioner Stephen A. Knox is an honors graduate student working on his doctorate in history at Pennsylvania State University, where he has maintained a 4.0

average since his admission in the Fall of 1990. (A 81). He graduated summa cum laude in 1986 with a bachelors degree from Temple University. (A 80). Knox was described by his graduate adviser, Dr. Nan Elizabeth Woodruff, as a serious student who has, throughout his case, maintained the rigorous work load required of him. Dr. Woodruff attested to the fact that Knox "easily ranks among [the] top five graduate students" at Penn State. (A 82). Similarly, Professor William A. Blair found Knox to have "enriched the graduate community at Penn State" and to have taken substantial initiative in gaining a mastery of his subject matter. Professor Blair also noted Knox's high motivation to achieve success in his chosen profession as an historian and the equally high likelihood that he will do so. (A 83).

Although Knox was previously convicted for receiving "child pornography" sold to him by a government sting operation, he has carefully and faithfully obeyed the terms of his probation, which has included attending therapy sessions on a regular basis. Relying heavily on the psychological evaluation of Dr. Fred Covan, Chief Psychologist at Bellevue Hospital in New York (A 84 to 88), the trial judge concluded that there is "*absolutely no evidence of any inclination by the defendant of untoward conduct toward anyone else*" and granted Knox bail pending appeal. (Emphasis added.) (ST 28 to 29)[3]

2. The Pretrial Motion

The district court granted a pretrial hearing on the issue

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[3]Three transcripts comprise the entire record in this case. Testimony and argument on the motions on August 28, 1991, are contained in the motion transcript, or "MT". The November 14, 1991, trial has the usual designation of "T". Sentencing and argument on the post-trial motions on February 13, 1992, are contained in the sentencing transcript, or "ST".

of whether the three videotapes could be found to depict minors engaging in "sexually explicit conduct" under the statute where the minors' genitals were completely covered by clothing. Because the defendant waived his right to a jury trial, the Court agreed to rule upon an issue usually reserved for trial. *Knox, supra*, 776 F. Supp. at 178-179. The trial court observed that "[t]his is a case of first impression." *Id.* at 180. The government conceded at the hearing (MT 66 to 69) and has conceded throughout this litigation that this is the very first prosecution based upon an exhibition of the genitals or pubic area covered by clothing. It is undisputed that nude genitals are never depicted in the three videotapes.

The trial judge acknowledged that the government's theory at trial rested upon an exhibition of the pubic area, rather than the genitals. In denying Knox's pretrial motion, the judge adopted a scientifically incorrect view that the uppermost portion of the inner thigh was part of the "pubic area" and -- since the inner thigh was exposed (nude) -- found that the three tapes contained an "exhibition" under § 2256(2)(E). The court left for trial its determination of whether that exhibition was "lascivious". *Id.* at 180.

3. The Bench Trial

At the bench trial on November 14, 1991, all of the testimony and exhibits on the motions to suppress and dismiss were incorporated for purposes of the trial. (T 3). The government introduced advertisements and a catalog for videotapes from Nather, Inc., with an address in Las Vegas, Nevada. The government offered envelopes, found at Knox's apartment, which bore Nather, Inc.'s address. These envelopes were printed and provided by Nather, Inc. to be used in ordering material. A $62 Traveller Express money order to Nather, Inc., dated June

4, 1990, (twenty-two (22) months prior to the date the indictment alleged the crime was committed) was also introduced. (T 6 to 7).

The government's sole witness, a Customs agent, testified that Knox had rented a mail box at Mail Box Etc. under the name of J. Richard Scott, several months *after* the money order to Nather was written. (T 7 to 9). On cross-examination, the agent acknowledged the possibility that the videotapes seized from Knox's apartment were "dubs", i.e. not the original tapes made and distributed by Nather. (T 11). The agent also acknowledged that he had no evidence that any materials were ever received by the defendant at the mail box. (T 12).

The defense offered into evidence various issues of *Video Magazine*, which contained Nather advertisements (T 15 to 16). The government offered copies of Nather brochures, seized from Knox's apartment, which proclaimed that the tapes were legal and contained no nudity or sexually explicit conduct. (MT 51). The defense argued in summation that the government had failed to prove the element of mailing, the necessary *mens rea*, and adopted the other arguments previously made at the pretrial motion. (T 17 to 20).

4. The Verdict

The court filed a written pleading on November 15, 1991, finding the defendant guilty on each count (without reasons), ordered a pre-sentence investigation, and set sentencing for February 13, 1992, at 1:00 p.m.

5. Post-Trial Motion

Prior to sentencing, Knox filed a motion for verdict of acquittal or, in the alternative, for a hearing to explore

further "the relationship of the medical and anatomical authorities to the intent of Congress" (A 51 to 55). The motion was supported by an affidavit of Dr. Todd Olson, Director of Human Gross Anatomy at the Albert Einstein College of Medicine, establishing the indisputable fact that the uppermost portion of the inner thigh is not the pubic area.

The trial judge denied the motion (A 58 to 60), and sentenced Stephen Knox to the minimum mandatory five (5) year term. (ST 22 to 24).

REASONS FOR GRANTING THE PETITION

Petitioner Stephen A. Knox was convicted for receipt and possession of three videotapes which contain depictions of a type which no court anywhere (either state or federal) has ever found criminal since the first federal child pornography laws took effect on February 1, 1978, fourteen years ago. The government has conceded that this is the first prosecution where it has been alleged or argued that genitalia that are completely covered by clothing can still be "exhibited".

Knox's petition raises substantial issues of a constitutional dimension. The Third Circuit's expansive interpretation of 18 U.S.C. § 2256(2)(E)'s term "exhibition" to include images of minors whose genitals and pubic areas are fully covered by clothing (and who are otherwise engaged in no sexually explicit conduct) avoids the plain meaning of the statute, violates the Rule of Lenity, distorts the legislative history, and creates a vague and overbroad interpretation of that criminal statute.

Given the substantial First Amendment rights at stake, the serious penalties faced by defendants convicted for "child pornography crimes", the enormous social stigma

attached to those even accused of the crime, and the widespread chilling effect on protected First Amendment conduct, such an overbroad reading of the child pornography statute cannot constitutionally stand.

The Third Circuit's expansion of the child pornography laws will have a chilling effect upon legitimate publishers and contravenes the limitations on such laws set forth in the *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Worse, the government will have an unlimited charging power. Depictions of minors in bathing suits, leotards, shorts, underwear, and other similar clothing are created every day and may be found everywhere throughout society. The Third Circuit's decision places such depictions into a "grey area" where a decision to prosecute may rest on the government's subjective view of the potential defendant, and is limited only by a "far from crystal clear" requirement of "lasciviousness". *United States v. Knox, supra*, 977 F.2d at 823 fn. 5. (PA 19).

The Third Circuit has misread the legislative history of the federal statute to find a Congressional intent to proscribe depictions of minors whose genitals and pubic areas are not exposed. In doing so, the Third Circuit has ignored the Rule of Lenity applicable to criminal statutes, and substituted its judgment for that of Congress. The result is to convict Knox of conduct neither he nor anyone else could possibly have known was criminal.

In finding Knox guilty of "knowingly" receiving and possessing "child pornography", the Third Circuit has held Knox to a standard of *scienter* which is inappiicable to the facts of his case and in conflict with analogous decisions of the Court of Appeals in *United States v. Gottesman*, _ _ F.2d ___, 1992 WL 367097 (9th Cir. decided December 16, 1992), and *Ripplinger v. Collins*, 868 F.2d 1043 (9th Cir. 1989).

A. There can be no "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing.

18 U.S.C. § 2256(2)(E) (1988) defines "sexually explicit conduct" to include a "lascivious exhibition of the genitals or pubic area of any person". It is not open to dispute that the videotapes in *Knox* did not depict either sexually explicit conduct as defined in 18 U.S.C. § 2256(2)(A) through (D) or even partial nudity of the genitals or pubic area. Moreover, as both the district court and Third Circuit decisions emphasized, in every instance the girls depicted in the videotapes were fully clothed.

1. The "Plain Meaning" of the Statute

Clearly, if the word "exhibition" has any meaning at all, it is that the object being "exhibited" actually be seen. "Exhibition" means "an exhibiting, showing or presenting to view," and "exhibit" means "to offer or *expose to view*; present for inspection". (Emphasis added). *Random House Dictionary of the English Language* (Unabridged), 1979. "Expose" means "to uncover or bare to the air, cold, etc.; to present to view, exhibit, display," and "view" means "to see, behold". *id.* The sole antonym listed in the *Random House Dictionary* for "exhibit" is "conceal," a word which means "to *cover* or keep from sight." *id.* (Emphasis added). Thus, the Third Circuit's statement that § 2256(2)(E) criminalizes "exhibitions" of the genitals or public areas "even when these areas are *covered* by an article of clothing," is literally a contradiction in terms. *United States v. Knox*, *supra*, 977 F.2d at 825 (PA 24) (emphasis added). Simply put, to exhibit something requires that the thing exhibited actually be seen -- that is, *not* covered, but exposed to view.

The Third Circuit could therefore not have been more inaccurate when it stated that "[a]pplying the plain meaning of the word "exhibition" leads to the conclusion that nudity is not a prerequisite for the occurrence of an exhibition." *Id.* at 820. (PA 11). The plain meaning of the proscription under 18 U.S.C. § 2256(2)(E) requires that the genitals or pubic area be exhibited -- not covered -- in the depiction in question. One does not attend an "exhibition" of sculpture or painting and expect to see the artwork covered. Common sense dictates that the artwork will be capable of being seen -- i.e., exposed to public view. Likewise, there can be no "exhibition of the genitals or pubic area" where these parts of the body are covered by clothing.[4]

2. The Legislative History

The Third Circuit's truncated reading of the legislative history of the child pornography law led it to conclude:

> Congress appears to have repudiated its earlier intention to confine the statute's coverage to nude exhibitions. Further, Congress failed to articulate anywhere in its extensive legislative history any desire that the statute, as enacted, prohibit only nude portrayals.

Id. at 821. (PA 12-13).

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[4]The Third Circuit's use of phrases such as "nude exhibition", "nude portrayal," and "clothed and unclothed images of a child's genitalia" highlights both a semantic and a logical problem with the Third Circuit's decision. It is not exhibitions, portrayals, or images which are clothed or nude, but genitals themselves. Moreover, the statute specifies that it is *genitals* that cannot be shown. Since "clothed genitals" are not genitals themselves, depictions of "clothed" genitals cannot fall under the statute's proscription.

However, the legislative history of 18 U.S.C. § 2252 *et seq.* makes absolutely clear Congress' intent to criminalize only depictions of children whose genitals or pubic areas were *nude* and who were engaged in exhibiting their genitals or pubic areas in a "lewd" (now "lascivious") manner.

The original legislative proposal introduced by Senator Roth in 1977, S. 1011 (the "Roth" bill), would have criminalized "nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." That provision was roundly criticized by lawyers who testified before Congress, as well by the Justice Department. A letter dated June 14, 1977, from Assistant Attorney General Patricia Wald to Senator Eastland, then-Chairman of the Committee on the Judiciary, specifically recommended that

> The term "nudity ... depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction" is also troublesome. This definition differs from the "average person" text for obscene material set forth in *Miller v. California*, *supra*, and it would be difficult to determine by what standard the "sexual stimulation or gratification" could be assessed. We would suggest as an alternative definition "lewd exhibitions of the genitals," a phrase used by the Chief Justice in *Miller v. California*, *supra*, to described one of a variety of types of conduct which could be prohibited under state obscenity statutes. Congress could make clear in the legislative history of the bill *what types of nude portrayals of children* were intended to be encompassed within this definition.

(Emphasis added.) *Protection of Children Against Sexual Exploitation*, Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the

Judiciary, United States Senate, 95th Congress, First Session, May 27, June 16, 1977, pp. 77-78.

The Justice Department recommendation to narrow the proposed ban on nudity was adopted by Senators Mathias and Culver in drafting S.1585 (the "Mathias-Culver" bill). The difference between the Roth and Mathias-Culver bills was the subject of University of Pennsylvania Professor Paul Bender's extensive testimony before Congress. Professor Bender, also former general counsel to the President's Commission on Obscenity and Pornography (1970), testified why the Mathias-Culver bill was preferable to the Roth bill vis-a-vis 18 U.S.C. § 2256(2)(E):

> Most importantly, is the definitional section of the Roth bill. It uses the conduct which it prohibits as having children engage in prohibited sexual acts and then it defines the prohibited sexual acts in a number of ways. Most of these definitions are okay. But some of them strike me as vague and so vague as to perhaps be unconstitutional. ... The nudity provision is a little bit troublesome also. It says, "nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." I have a problem with that in knowing whose purpose they are talking about and when that has to be the purpose. Is the notion of this that the person taking the picture has to take the picture for the purpose of stimulating or gratifying someone else sexually, or is it enough if the picture is simply used that way for that purpose by somebody later, even if that was not the purpose of the person who took the picture?
>
> Nudity generally, I think, may be a bit overbroad in terms of the purposes of the legislation. I would not want to classify as child abuse anyone who takes

> a picture of a child without any clothes on. Lots of people do that of their children. They send it to the child's grandparents in interstate commerce. I don't think you would want to cover that. *So I think it's right to qualify "nudity." But this qualification [in the Roth bill] strikes me as vague."*

(Emphasis added.) *Protection of Children Against Sexual Exploitation*, Hearings, *supra*, p. 103.

In other words, Professor Bender understood the phrase "lewd exhibition of the genitals," contained in the Mathias-Culver bill, as a qualification -- and a narrowing -- of the broader term "nudity". It was, *in fact*, a qualification and narrowing, because by limiting to the scope of the proscription on nudity to "lewd exhibition of the genitals or pubic area," Senators Mathias and Culver ruled out other types of nude portrayals, e.g. nudity of the breasts or buttocks. The first child pornography law, The Protection of Children Against Sexual Exploitation Act of 1977, adopted the Mathias-Culver language and limited the law's application only to those depictions which contained a "lewd exhibition of the genitals or pubic area" within the context of "sexually explicit conduct". Congress has never acted to expand that proscription.

As used in the statute, the phrase "lewd exhibition of the genitals" has a common sense meaning: it refers to a type of sexual conduct on the part of the model depicted which is designed to exhibit and draw attention to his or her genitals. Such was the understanding of members of Congress and witnesses who appeared before it in hearings in 1982, when Congress was considering amending the child pornography statute in light of *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), to remove the requirement that depictions of minors engaged in "sexually explicit conduct" be obscene

in order to be proscribed. Senator Specter, mindful of the problems of constitutional overbreadth which might be posed by an outright ban on non-obscene depictions of "lewd exhibition[s] of the genitals or pubic area," proposed that such exhibitions continue to be protected if they possess literary, artistic, or scientific merit.

In discussing this proposal, Bruce Rich, on behalf of the Association of American Publishers, suggested that the exception should apply to the entire range of "sexually explicit conduct," not merely to "lewd exhibitions of the genitals." Mr. Rich, like the members of Congress who were considering changes in the law, correctly assumed that the phrase described a *type* of nudity:

> We say, first, that it is not enough merely to tag on the literary, etc., exception to exhibitions of nudity, as Senator Specter's own proposal would suggest .... We would suggest having the literary, artistic, etc. exemption to modify the entire range of conduct which would be otherwise prohibited.

Child Pornography, Hearing before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, United States Senate, 97th Congress, December 10, 1982. Serial No. J-97-152, pp. 19-20.

In 1986, when Congress again contemplated amending the child pornography laws, comments by Senator Roth accurately reflect that what Congress had intended to criminalize in 1977 were *nude* depictions of a certain character. Senator Roth, speaking in support of H.R. 5560, the "Child Sexual Abuse and Pornography Act of 1986," the House counterpart to his bill, S. 2398, correctly referred to "child pornography" as "photos, films and videotapes depicting *nude* young children *engaged in explicit sexual behavior*". (Emphasis added.) *Congressional*

Record, Senate, October 18, 1986, S. 17296.

The Supreme Court has used the phrase "lewd exhibition of the genitals" to denote exhibitions where the genitals are visible, i.e., nude, and in which the subject is engaging in some sort of conduct intended to draw attention to his or her exposed genitals in a sexual manner. In *New York v. Ferber*, *supra*, 458 U.S. at 762-3, 102 S.Ct. at 3357, Justice White observed that

> It is unlikely that visual depictions of children ... *lewdly exhibiting their genitals* would often constitute an important and necessary part of the literary performance or a scientific or educational work.

In *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d (1974), where the Supreme Court held that the film "Carnal Knowledge" could not be "obscene" as a matter of constitutional law, Justice Rehnquist inquired whether the film contained hard core sexual acts or "lewd exhibitions of the genital" and found that

> [w]hile the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatsoever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standard.

418 U.S. at 161, 94 S.Ct. at 2755.

Clearly, Justice Rehnquist was talking about exhibitions of genitals where the genitals were visible, not covered by

clothing. This is the only common sense -- and plain -- meaning to be derived from the phrase.

Nowhere in the entire legislative history of the child pornography laws, as amended over a period of fourteen years, is there *any* discussion by *anybody* which would indicate that videotapes which depict fully clothed minors not otherwise engaged in sexual conduct could be criminalized. Moreover, the extensive discussions regarding "child pornography" and "sexually explicit conduct" unquestionably reflect a consensus of opinion that "lewd exhibition of the genitals" represented the type of *nudity* which Congress wished to ban.

3. Precedent

In fourteen years of zealous enforcement of the federal child pornography laws, no person other than Stephen A. Knox has been indicted or convicted for receiving or possessing depictions of minors whose genitals and pubic areas are fully covered by clothing. Nor has any person been indicted or convicted for producing such depictions. *Every* case involving allegations of "child pornography" has involved depictions of minors engaged in actual sexual conduct or whose genitals or pubic areas were nude and exposed to view. Even if it *could* be argued that the plain words of the statute proscribe depictions of minors whose genitals and pubic areas are fully covered by clothing, the fact that there have been no prosecutions other than Knox further suggests that the Third Circuit's interpretation of § 2256(2)(E) is at odds with the general understanding of that section on the part of law enforcement officials, prosecutors, and the public at large. This is especially true, where, as here, the very producer and seller of the videotapes in question carried out its business openly through nationally-prominent publications without suffering any legal repercussions.

The sole authority relied upon by the Third Circuit for its finding that "lascivious" depictions of minors whose genitals are fully covered are illegal under § 2256(2)(E) is *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986). In *Dost*, the court outlined six factors "among any others that may be relevant in the particular case" in determining whether an exhibition of the genitals or pubic area is "lascivious". *Id.*, at 832. Those factors included such considerations as where and by whom the photograph was taken, the focal point of the image, and the demeanor of the subject. The fourth *Dost* factor, "whether the child is fully or partially clothed, or nude," according to the Third Circuit, "rests on the implicit assumption that a clothed exhibition of the genitals is criminalized under the statute." *Knox*, *supra*, 977 F.2d at 823. (PA 17).

The Third Circuit's conclusion is based on a number of errors. First, depictions of clothed minors were not at issue in *Dost*. Both subjects in *Dost* were "totally nude": the first was photographed "in a variety of positions ... with her genitals and breasts fully exposed"; the second was photographed in a contorted pose so that "[h]er pubic area is completely exposed, not obscured by any shadow or body part." *United States v. Dost*, *supra*, 636 F. Supp. at 833. Second, the *Dost* court's discussion of the fourth factor made it clear that the statute requires that the genitals actually be seen, i.e., nude:

> For example, consider a photograph depicting a young girl reclining or sitting on a bed, *with a portion of her genitals exposed*. Whether this visual depiction contains a "lascivious exhibition of the genitals" will depend on other aspects of the photograph. If, for example, she is *dressed* in a sexually seductive manner, with her open legs in the foreground, the photograph would most likely constitute a lascivious exhibition of the genitals....

> On the other hand, if the girl is *wearing clothing* appropriate for her age, the visual depiction may not constitute a "lascivious exhibition" of the genitals, *despite the fact that the genitals are visible.*

(Emphasis added). *United States v. Dost*, *supra*, 636 F. Supp. at 832.

What the Third Circuit ignored in its reading of *Dost* is the fact that the *Dost* court's entire discussion was premised on the fact that the subject's genitals were exposed, visible, nude -- i.e., not fully covered by clothing.

Third, the Third Circuit used the fourth *Dost* factor as a means to determine whether there has been an *exhibition*. The *Dost* court considered it relevant only to determine whether the "exhibition" in question was "lascivious". As the Ninth Circuit observed in *United States v. Arvin*, 900 F.2d 1385, 1391 (9th Cir. 1990) the two issues are markedly different:

> In formulating an instruction defining "sexually explicit conduct" under § 2256(2)(E), the Court, of course, must instruct the jury that it must find that the pictures visually depict the minor's genitals or pubic area. This is a threshold element contained in the [statute] itself, distinct from the additional requirement that the depiction be "lascivious".

Thus, even if the *Dost* factors were appropriate to determining whether a given exhibition is "lascivious"[5], they are utterly inappropriate to determining whether an "exhibition" has occurred.

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[5]The *Dost* factors, of course, are not part of the statute and they have not been universally recognized as the definitive interpretation of it. Nor does petitioner believe they should be.

One of the photographs at issue at trial in *United States v. Villard*, 700 F. Supp. 803 (D. N.J. 1988), aff'd. 885 F.2d 117 (3d Cir. 1989), makes it clear why a court might inquire whether the subject was "fully or partially clothed, or nude" in analyzing whether an "exhibition of the genitals or pubic area" is a "lascivious" one. That photograph depicted a *fully clothed* teenage boy, whose erect penis was sticking out one of the legs of his shorts. (See *United States v. Villard*, *supra*, 700 F. Supp. at 805.) The fact that the boy was fully clothed *and* his genitals were exhibited suggests that the court in *Knox* has mistaken "clothed" for "covered". That is, a minor may, in fact, be *fully clothed*, while his or her genitals are *uncovered*, i.e., exhibited. This is easily accomplished by pushing the clothing aside or causing the genitals or pubic area to appear through an opening in the clothing. It is these depictions to which the fourth *Dost* factor might be relevant, not to depictions such as those in *Knox* where the subjects were fully *clothed* and their genitals fully *covered*.

D. The Rule of Lenity Requires Reversal of Knox's Conviction

Nothing in the statute, the legislative history, or the case law suggests that "child pornography" as defined under § 2256(2)(E), encompasses depictions of fully clothed minors in which neither the genitals nor the pubic areas are exposed to view. The Third Circuit's interpretation of this criminal statute is admittedly expansive:

> Although our interpretation of an exhibition is *expansive*, the limiting principle in the statute is the requirement of lasciviousness.

(Emphasis added). *United States v. Knox*, *supra*, 977 F.2d at 823. (PA 19).

Such an expansion of a criminal statute is impermissible and violates the Rule of Lenity, "a rule of statutory construction whose purpose is to help give authoritative meaning to the statutory language." *United States v. Thompson Center Arms Co.*, ___ U.S. ___, 112 S.Ct. 2102, 2110 fn. 10, ___ L.Ed.2d ___ (1992).

The "venerable Rule of Lenity" is "rooted in 'the distinctive distaste against men languishing in prison unless the lawmaker has clearly said that they should.'" *United States v. Bass*, 404 U.S. 336, 347-348, 92 S.Ct. 515, 522-523, 30 L.Ed.2d 488 (1971), quoting H. Friendly, *Benchmarks*, 209 (1967). *See also*, *United States v. R.L.C.*, ___ U.S. ___, 112 S.Ct. 1329, 1338, ___ L.Ed.2d ___ (1992). The Rule of Lenity has two (2) purposes. "The main function of which, as Justice Stevens recently observed,

> is to protect citizens from the unfair application of ambiguous punitive statutes. Obviously, citizens should not be subject to punishment without fair notice that their conduct is prohibited by law.

United States v. Thompson Center Arms Co., *supra*, 112 S.Ct. at 2114 (Stevens, J. dissenting).

The Rule of Lenity requires "fair warning", in language that the common world will understand, of what the law intends to do if a certain line is crossed. *Liparota v. United States*, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089, 85 L.Ed.2d 434 (1985). *See also*, *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931).

The second purpose for the Rule of Lenity is to ensure that lawmakers have genuinely called for punishment to be meted out. "Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community,

legislatures and not courts should define criminal activity." *United States v. Bass*, *supra*, 404 U.S. at 348, 92 S.Ct. at 523; *Liparota v. United States*, *supra*, 471 U.S. at 427, 105 S.Ct. at 2089. The applicability of the Rule of Lenity to the interpretation of 18 U.S.C. § 2256(2)(E) is required by the government's concession that no federal prosecution has ever before claimed that genitals may be "exhibited" at the same time that they are completely covered. The lack of prosecution is certainly not explained by an absence of such depictions in our society (or that the government alone was oblivious to them). It seems beyond unfair that an individual graduate student who possessed three tapes containing such depictions can be the first and only person ever prosecuted under this interpretation of the statute.

In *United States v. R.L.C.*, *supra*, Justice Souter, for the majority, and Justice Scalia, for the dissent, tangled over whether the Rule of Lenity must be applied to a facially ambiguous statute before the court resorts to legislative history. Justice Scalia argued forcefully that the Rule of Lenity precluded using legislative history against a defendant to save a facially ambiguous statute. 112 S.Ct. at 1339-40. However, such a dispute has no application here. The legislative history and the absence of any previous enforcement join the unconstitutional overbreadth of the Third Circuit's interpretation to argue *for* the defendant and the application of the Rule of Lenity.

B. The government failed to prove Knox had the requisite *scienter* to violate the statute.

Even assuming *arguendo*, that a "lascivious exhibition of the genitals or pubic area" may include exhibitions of fully clothed minors whose genitals are completely covered, Knox lacked the requisite *scienter* to commit the crime of receiving and possessing "child pornography" because he

could not have known that such depictions ran afoul of the statute. This is more than just an excuse that he was ignorant of the law. Given the history of law enforcement in this area and the ubiquity of images of fully clothed minors whose genitals are completely covered, no person could reasonably be expected to have known that such images fell within the definition of "child pornography".

Common understanding of what laws mean encompasses not only the language of the statute itself, but also "the gloss which life has written upon it". *Nashville C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1254 (1940). As Professor Bickel has noted, "[t]he average nonreader of the statute books knows of the law what he knows of ethics and customs, and for the rest, what he knows of prosecutions." Bickel, 'The Supreme Court -- Foreward,' 75 *Harvard L. Rev.* 40, 63 (1961).

The fact that every other prosecution under the statute has involved images of minors either engaged in sexual behavior or whose genitals or pubic areas were nude and exposed to view weighs heavily against the Third Circuit's finding that Knox possessed the requisite *scienter* to violate the statute. Knox's purported awareness that the videotapes contained "materials designed to sexually arouse a pedophile" (*United States v. Knox, supra*, 977 F.2d at 825 (PA 24)) is irrelevant to his guilt if no reasonable person could have known that depictions of clothed minors could run afoul of the child pornography laws. (PA 24). As the Third Circuit itself taught in *United States v. Villard, supra*, 885 F.2d at 125, "[w]hen a picture does not constitute child pornography ..., it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it." *See also, Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1344-45 (N.D. Texas 1985), affirmed *sub nom. Faloona by Frederickson v. Hustler*

Magazine, Inc., 799 F.2d 1000 (5th Cir. 1986) (since "the nude pictures [did] not show the plaintiffs engaging in any sexual conduct or performing any sexual activity," they were not "child pornography," notwithstanding their appearance in an "offensive" magazine like *Hustler*.)

Under the circumstances, a *reasonable* mistake as to the legality of the materials must be a defense. In *United States v. United States District Court for Central Dist. of Cal.*, 858 F.2d 534 (9th Cir. 1988), the Ninth Circuit held that the First Amendment requires that a defendant charged with violating 18 U.S.C. § 2251(a) be entitled to an affirmative defense based on a reasonable mistake of age. In *United States v. Gottesman*, *supra*, the Ninth Circuit held 18 U.S.C. § 2252 unconstitutional because the statute did not require proof of *scienter* that the materials distributed are child pornography. In *Gottesman*, the government argued that § 2252 required knowledge only of the "nature and character of the material":

> The government's position is a bit cagey; it suggests at times that the statute requires that the distributor know that the material is child pornography, but argues that it does not require that the distributor know the age of the performers.... What the government seems to be saying..., however, is that the statute does not even require that the defendant know that one or more performers was under the age of 18, so long as he knew the general nature of the materials he was distributing.

Id. 1992 WL 367097, *3.

The *Gottesman* court, which held § 2252 unconstitutional for failure to require knowledge that at least one of the persons depicted in the images in question was a minor, distinguished *United States District Court for the*

Central Dist. of Cal., *supra*, because producers are in a far different position from those who merely receive or transport visual images after they are fixed on film or videotape. Thus, while the Constitution merely requires the availability of an affirmative defense to producers charged under § 2251(a), the Ninth Circuit held that those charged under § 2252 cannot constitutionally be found guilty where they have not been charged with knowing that one of the persons depicted was under the age of 18.

In *United States v. Sherin*, 1987 WL 6146 (S.D.N.Y.), Judge Lowe, unlike the *Gottesman* court, judicially engrafted a *scienter* requirement onto 18 U.S.C. § 2252 to save it from unconstitutionality, but dismissed the indictment for failure to allege an essential element of the crime. These cases suggest that the Third Circuit's reliance on *Hamling v. United States*, 418 U.S. 87, 123, 94 S.Ct. 2887, 2910, 41 L.Ed.2d 590 (1974); *United States v. Brown*, 862 F.2d 1033 (3d Cir. 1988); and *United States v. Moncini*, 882 F.2d 401, 404 (9th Cir. 1989) are inappropriate to the facts in *Knox*. Indeed, the Third Circuit's discussion of the rationale behind *Hamling*, *Brown*, and *Moncini* highlight the injustice of applying a similar *scienter* to Knox:

> To require proof that the defendant knew the materials were obscene and thus illegal to distribute, would allow defendants to avoid prosecution by claiming ignorance of the relevant law.... the child pornography laws would be eviscerated if a pedophile's personal opinion about the legality of sexually explicit videos was transformed into the applicable law.

United States v. Knox, *supra*, 977 F.2d at 825. (PA 22-23).

Hamling was obviously aware that he was dealing with materials depicting "sexually explicit conduct" of the type

that could be found to be obscene. Both Brown and Moncini knew they were dealing with materials depicting minors engaged in sexually explicit conduct. Brown merely believed that the material would depict adolescents under the age of 18, rather than pre-pubescents, while Moncini merely believed that mailing child pornography to the United States was not illegal. Knox possessed no such knowledge and was misled by the language of the statute, the legislative history, and the pattern of enforcement into believing that depictions of minors whose genitals were fully covered were not illegal. His good faith and objectively reasonable belief that these tapes did not violate the law prohibit his conviction.

C. If there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by clothing, then 18 U.S.C. § 2256(2)(E) is unconstitutionally vague and overbroad.

A statute which fails to provide adequate notice as to what conduct is prohibited is vague and cannot survive constitutional scrutiny. Moreover, if Congress is now held to have intended to include within the definition of § 2256(2)(E) depictions of fully clothed minors, then the law, as drafted, is facially invalid for overbreadth, because the arguably impermissible applications of the statute are real and "substantial." *See New York v. Ferber*, *supra*, 458 U.S. at 773, 102 S.Ct. at 3363.

Depictions of minors in which the genitals and pubic area are fully covered by clothing such as leotards, bathing suits, and underwear are undisputedly ubiquitous and can be found in newspapers, books, and magazines, clothing catalogs, family albums, on the walls of art museums, in movies and on television, at fashion shows, dance recitals, and gymnastics and swimming meets. It is

hardly comforting that "the limiting principle in the statute is the requirement of lasciviousness," the meaning of which the Third Circuit has described as "far from crystal clear." *United States v. Knox*, *supra*, 977 F.2d 823 fn. 5. (PA 19).

If an "exhibition of the genitals or pubic area" can be satisfied by fully clothed depictions of minors, the chilling effect of this law will be enormous. Anyone who has photographed a minor at a dance recital, swim or gymnastics meet, at the beach, or at home, will understand the danger of photographing a minor in a pose which could ultimately be deemed to be pornographic under federal law. Every photo will have to be examined to insure that the clothing covering the genitals and pubic area does not somehow end up as a "focal point" in the photograph, that the child doesn't look coy or appear to be striking an unnatural pose, or that the image doesn't contain any telltale signs of a "lascivious" intent. Parents will have to take care when photographing their children playing dress-up where the clothing will surely be "inappropriate" and where the children might strike "alluring" poses in childish playfulness, even though they are fully clothed. Any photographs of a clothed child taken in the proximity of a bed -- "a place associated with sexual activity" -- will be suspect. Another problem is that prosecuting authorities will have unlimited power to "get" an unpopular person, a political opponent, or a personal enemy because of the newly-established ease of making this dramatic criminal charge.

Such overbreadth cannot constitutionally be tolerated. When the Supreme Court upheld as constitutional the New York child pornography statute in *New York v. Ferber*, *supra*, it did so because the New York statute listed the prohibited sexual acts "with sufficient precision."

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of "sexual conduct" proscribed must also be suitably limited and described.
>
> • • • •
>
> [The New York statute's] prohibition incorporates a definition of sexual conduct that comports with the above-stated principles .... The term "lewd exhibition of the genitals" is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation.

New York v. Ferber, 458 U.S. at 764-5, 102 S.Ct. at 3358-9.

The Supreme Court did *not* envision that the statute could be applied to depictions of clothed genitals and, in fact, warned:

> Nor will we assume that the New York courts will widen the possibly invalid reach of the statute *by giving an expansive construction* to the proscription on "lewd exhibition[s] of the genitals.

(emphasis added). *New York v. Ferber*, *supra*, 458 U.S. at 773, 102 S.Ct. at 3363.

A statute which on its face proscribes exhibitions only of "genitals or pubic areas" but which includes depictions

where those parts of the body are "fully covered" can hardly be said to be precise. A simple comparison of the wording of the federal statute with that of many state statutes which specify the type of covering required makes this obvious. The Third Circuit's decision in *Knox* clearly constitutes an expansive construction of the statute against which the Supreme Court warned.

Of course, as Justice White pointed out in *New York v. Ferber*, 458 U.S. at 769, 102 S.Ct. at 3361:

> When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction. [citations omitted].

Rather than construe the statute narrowly, the Third Circuit chose to expand it, potentially criminalizing a "broad range of innocent conduct". Where, as here, there is no specific intent on the part of Congress that the statute "be so all-encompassing," such an interpretation should be rejected. *United States v. Yip*, 930 F.2d 142, 149 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 197, 116 L.Ed.2d 157. *See also*, *Liparota v. United States*, *supra*, 471 U.S. 419, 426, 105 S.Ct 2084, 2088, 85 L.Ed.2d 434 (1985). That Congress did not intend the statute to be so "all-encompassing" is obvious from the fact that it refrained from criminalizing even "lascivious" depictions of uncovered breasts or buttocks[6], and defined the term

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[6]For example, Connecticut Penal Code § 53a-193, prohibits depictions of the genitals, pubic area, or buttocks "with less than a fully opaque covering... or the depiction of the covered male genitals in a discernibly turgid state." *See also*, Hawaii Penal Code, § 8707-750; Kansas Criminal Code, Article 35, § 21-3516; Mass. Penal Code § 31; North Carolina Criminal Law, Article 26, § 14-190.13; Utah Criminal Code, Chapter 5a, § 76-5a-2; and Virginia Criminal Code, Article 6, § 18.2-390.

"lascivious exhibition of the genitals" in reference to the phrase "sexually explicit conduct," which is defined in 18 U.S.C. § 2256 also to include sexual intercourse, bestiality, masturbation, and sadistic and masochistic abuse. Although certain courts and prosecutors might wish to criminalize all depictions of minors which are "designed to sexually arouse a pedophile", we must heed Justice Brandeis' warning that

> [s]tatutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive.

United States v. Weitzel, 246 U.S. 533, 543, 38 S.Ct. 381, 383, 62 L.Ed. 872, 875 (1918).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Filed October 15, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-7089

UNITED STATES OF AMERICA

v.

STEPHEN A. KNOX,

Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Crim. No. 91-00074)

Argued August 17, 1992
BEFORE: HUTCHINSON, COWEN AND WEIS,
Circuit Judges

(Filed October 15, 1992)

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OPINION OF THE COURT

Cowen, *Circuit Judge*.

The principal question presented by this appeal is whether videotapes that focus on the genitalia and pubic area of minor females constitute an "exhibition of the genitals or pubic area" under the federal child pornography laws, 18 U.S.C. § 2252(a)(2), (4) (Supp. 1990); 18 U.S.C. § 2256(2)(E) (1988), even though these body parts are covered by clothing. We hold that such visual depictions qualify as an exhibition, and that this construction does not render the statute unconstitutionally overbroad. Finally, we conclude that the government presented sufficient evidence at the bench trial to establish both the necessary mens rea and the delivery of the films through interstate mail. We thus will affirm the conviction.

I.

In March of 1991, the U.S. Customs International Branch intercepted a mailing to France which contained a request that two videos, "Little Girl Bottoms (Underside)" and "Little Blondes" be sent to J. Richard Scott, 210 West Hamilton Avenue, No. 108, State College, PA. The parcel also contained a check drawn on the account of Stephen Knox and bearing his signature. The check listed his address as 210

East Hamilton Avenue, No. 25, State College, PA. A second envelope addressed to J. Richard Scott from the Netherlands also was confiscated and contained a catalog advertising for sale videotapes depicting nude, semi-clothed and clothed minors. Aware that Knox previously had been convicted of receiving child pornography through the mail, the customs investigators obtained a search warrant and with the assistance of the Pennsylvania State Police searched his apartment.[1]

The police officers seized three video cassettes produced by the Nather Company (hereafter "Nather Tapes"), a videotape distribution company based in Las Vegas, Nevada. A catalog from the Nather Company with checkmarks by several video selections was also removed from Knox's apartment. One of the marked videos in the brochure corresponded to a segment of a compilation tape which was seized. Envelopes addressed to Nather and Nather mail order forms were discovered as well as a carbon copy of a money order payable to Nather Company for an amount approximately equal to the price of a single video.

The tapes contained numerous vignettes of teenage and preteen females, between the ages of ten and seventeen, striking provocative poses for the camera. The children were obviously being directed by someone off-camera. All of the children wore bikini bathing suits, leotards, underwear or other abbreviated attire while they were being filmed. The government conceded that no child in

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1. The district court determined that the search of Knox's apartment did not violate the Fourth Amendment, and Knox does not contest this decision on appeal.

the films was nude, and that the genitalia and pubic areas of the young girls were always concealed by an abbreviated article of clothing. The photographer would zoom in on the children's pubic and genital area and display a close-up view for an extended period of time. Most of the videotapes were set to music. The films themselves and the promotional brochures distributed by Nather demonstrate that the video tapes clearly were designed to pander to pedophiles. *See infra* typescript at 5.

The United States prosecuted based exclusively on the three Nather tapes. Knox was indicted on two counts: (1) knowingly receiving through the mail visual depictions of a minor engaged in sexually explicit conduct and (2) knowingly possessing three or more videotapes that contain a visual depiction of a minor engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2) and (4). Sexually explicit conduct for both of these offenses is defined to include a "lascivious exhibition of the genitals or pubic area." 18 U.S.C. § 2256(2)(E).

Pursuant to Federal Rule of Criminal Procedure 12(b), Knox filed a pre-trial motion to dismiss the indictment contending that the videos did not contain an "exhibition" of the genitals or pubic area since these areas were always covered by underwear, a leotard or a bathing suit. Knox and the government agreed to a pre-trial hearing to determine whether the indictment was facially sufficient. The district judge viewed portions of the Nather tapes which the parties stipulated were representative of the material contained in the videos. To determine the meaning of the statutory language, "exhibition of the pubic area", the

district court looked to the plain meaning of the words. Since the pubic area is located directly adjacent to the genitalia, the district court concluded that other areas in close proximity to the genitals, specifically the "uppermost portion of the inner thigh", were also included in the statutory definition of the pubic area. *District Court Memorandum* at 14; App. at 41. Since the upper portion of the inner thigh was clearly exposed, the court held that the tapes contained an exhibition of the pubic area, and therefore denied Knox's motion to dismiss the indictment.

Knox waived his right to a jury trial and a bench trial was held. At the bench trial, all of the exhibits and testimony from the pre-trial hearing were incorporated into the record for purposes of the trial. Additionally, the government admitted into evidence advertising catalogs from Nather, Nather mail order forms, and envelopes addressed to the Nather Company which were seized from Knox's apartment. The catalogs described in detail the contents and intended effect of the films that could be purchased:

> 'Sassy Sylphs' will blow your mind so completely you'll be begging for mercy.
>
> Just look at what we have in this incredible tape: about 14 girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy. There are panties showing under shorts and under dresses and skirts; there are boobs galore and T-back (thong) bathing suits on girls as young as 15 that are so revealing it's almost like seeing them naked (some say even better).

District Court Memorandum at 11; App. at 38.

The government also introduced evidence to establish that Nather mailed the tapes from its office in Nevada to the mailbox which Knox had rented under a fictitious name. Finally, the carbon copy of a sixty-two dollar money order payable to Nather was admitted to prove the method of payment. Although Knox did not testify and called no defense witnesses, he introduced magazine advertisements for Nather's videotapes which claimed that the absence of complete nudity rendered the tapes legal to purchase and possess.

The district court found Knox guilty on both counts. Thereafter, on February 13, 1992, Knox filed a motion for a judgment of acquittal or, alternatively, as he styled it, an application for a hearing to explore the anatomical issue decided by the court, predicated upon the contention that the uppermost portion of the inner thigh is not the pubic area. In conjunction with this motion, Knox submitted the affidavit of Dr. Todd Olsen, Director of Human Gross Anatomy at the Albert Einstein College of Medicine. The affidavit of Dr. Olsen stated that defining the pubic area to encompass the uppermost portion of the inner thigh is anatomically incorrect. Since the motion was filed three months after entry of the verdict, the district court denied the motion as untimely. Knox was sentenced to the minimum mandatory term of imprisonment of five years for each count, to be served concurrently. He appealed from the denial of the motion to dismiss the indictment, the guilty verdict, and the denial of the post-trial motion for judgment of acquittal.

II.

As a preliminary matter, we must resolve whether this Court has jurisdiction to review the denial of the post-trial motion for judgment of acquittal. Federal Rule of Criminal Procedure 29(c) provides: "If the jury returns a verdict of guilty . . ., a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period." The time limit imposed on criminal defendants by Rule 29(c) may only be extended by court order, and a district court's refusal to consider a motion which is not made within the specified period is not error. *United States v. Wright-Baker*, 784 F.2d 161, 170 (3d Cir. 1986); *United States v. Heneshaw*, 687 F. Supp. 183, 185 (E.D. Pa.), *aff'd*, 862 F.2d 311 (3d Cir. 1988). The district court entered the verdict of guilty against Knox on November 15, 1991. Knox's counsel failed to move for a judgment of acquittal until February 13, 1992, far beyond the seven-day period mandated by Rule 29. Although the district court had the power to rule on Knox's belated motion, *see United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987), the exercise of that power was discretionary and the district judge chose to deny the motion as untimely. The district court clearly acted within its discretionary authority in refusing to reach the merits of a motion filed three months after the entry of the verdict. Knox seeks to appeal the substantive issues raised by his motion for judgment of acquittal. Since we conclude that the district court did not abuse its discretion in declining to entertain the motion, we need not

address the substance of that application. We now turn to the remaining rulings before us: the denial of the motion to dismiss the indictment and the entry of the guilty verdict.

III.

The Protection of Children Against Sexual Exploitation Act of 1977, as subsequently amended, criminalizes knowingly receiving through the mail visual depictions of a minor engaged in sexually explicit conduct and knowingly possessing three or more videotapes which contain a visual depiction of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2252(a)(2), (4). Sexually explicit conduct for purposes of both of these offenses is defined to include the "lascivious exhibition of the genitals or pubic area." 18 U.S.C. § 2256(2)(E). Holding that the indictment was facially sufficient, the district court reasoned that the statutory requirement that there be an exhibition of the pubic area was fulfilled since the uppermost portion of the inner thigh is part of the pubic area, and the upper thighs were clearly exposed. Because the meaning of the terms "pubic area" and "exhibition" under 18 U.S.C. § 2256(2)(E) poses a pure question of law, our review is plenary. *United States v. Brown*, 862 F.2d 1033, 1036 (3d Cir. 1988).

The district court's novel definition of the pubic area is anatomically and legally incorrect. The most widely accepted human anatomy treatises make clear that the pubic area is entirely above the genitals and not below or alongside that portion of the anatomy. H. Gray, *Gray's Anatomy*, 90-91 (30th ed. 1985); *Dorland's Illustrated Medical Dictionary*, 1533 (27th ed. 1988). The

uppermost portion of a female's thighs is not contained in the pubic area as the district court found. On its face, the statute criminalizes only exhibitions of the genitals or the pubic area. It does not prohibit depictions of body parts simply because they are located in close proximity to the genitals. Nor does the statute criminalize all visual images of children which an individual may find sexually arousing.

It is axiomatic that when the statutory language is clear, the words must be interpreted in accordance with their ordinary meaning. *Malloy v. Eichler*, 860 F.2d 1179, 1183 (3d Cir. 1988). Only the most extraordinary showing of contrary congressional intent may justify altering the plain meaning of a statute. *Id.* No evidence was presented that Congress intended to give the term "pubic area" a meaning more expansive than its standard medical definition. Even if the boundaries of the pubic area were uncertain, the rule of lenity mandates that ambiguity concerning the coverage of a criminal statute must be resolved in favor of the criminal defendant until Congress unequivocally states that the court has misconstrued its scope. *Crandon v. United States*, 494 U.S. 152, 168, 110 S.Ct. 997, 1006 (1990). The plain meaning of the statute coupled with the rule of lenity require the legal definition of "pubic area" to be confined to its medically accepted meaning. Displaying any portion of the inner thighs does not constitute an exhibition of the pubic area under 18 U.S.C. § 2256(2)(E).

IV.

Since the district court found that an exhibition existed from the exposure of the upper inner thigh,

it refused to decide whether the filming of the children's covered genitals and pubic area qualified as an exhibition. Having adopted the medical definition of the term "pubic area", we address the principal issue on appeal, the interpretation of an "exhibition." The government contends that the pictorial representation of the genitals or pubic area, covered only by underwear, a bikini bathing suit, a leotard or other abbreviated attire constitutes an exhibition of that body region. Defendant asserts that the genitals or pubic area must be unclad or nude, and fully exposed to the camera, before an exhibition may occur.

When interpreting a statute, the starting point is always the language of the statute itself. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537 (1982). Courts presume that Congress expressed its legislative intent through the ordinary meaning of the words it chose to use, *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 591 (1962), and if the statutory language is clear, it is not necessary to glean congressional intent through an examination of legislative history, *TVA v. Hill*, 437 U.S. 153, 184 n. 29, 98 S.Ct. 2279, 2296 n. 29 (1978); *Barnes v. Cohen*, 749 F.2d 1009, 1013 (3d Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S.Ct. 2126 (1985). An extraordinary showing of contrary congressional intent is necessary to justify altering the plain meaning of a statutory term. *Malloy*, 860 F.2d at 1183.

Knox attempts to read a nudity requirement into a statute which has none. The amended Protection of Children Against Sexual Exploitation Act criminalizes the "lascivious exhibition of the genitals or pubic area." 18 U.S.C. § 2256(2)(E)

(1988). Exhibit means "to present to view: show, display . . . to show publicly: put on display in order to attract notice to what is interesting or instructive." *District Court Memorandum* at 16 (quoting *Webster's New International Dictionary, Unabridged* (1976)). The genitals and pubic area of the young girls in the Nather tapes were certainly "on display" as the camera focused for prolonged time intervals on close-up views of these body parts. Additionally, the obvious purpose and inevitable effect of the videotape was to "attract notice" specifically to the genitalia and pubic area. Applying the plain meaning of the word "exhibition" leads to the conclusion that nudity is not a prerequisite for the occurrence of an exhibition.

Since the statutory language does not suggest that a nude exhibition is necessary, Knox bears the burden of demonstrating a clear contrary congressional intent to warrant importing into the statute an unexpressed requirement. *See Malloy*, 860 F.2d at 1183. An examination of the relevant legislative history, however, strengthens not undermines our construction of the statutory language. The legislative proposal before the original child pornography statute was enacted in 1977 would have proscribed "nudity, which nudity is depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." S. 1011, 95th Cong., 2nd Sess. (1977). Clearly, Congress understood how to limit the statute's scope to encompass only nude displays.

Since Congress considered including nudity as an element of a criminal depiction, the decision to eliminate this requirement must be deemed

intentional. When Congress passed the 1977 Act prohibiting a "lewd exhibition of the genitals or pubic area of any person", it must have desired to criminalize both clothed and unclothed visual images of a child's genitalia if they were lewd.[2] Appellant relies on a letter from the Justice Department outlining its views concerning S. 1001, the original proposed bill (containing the nudity language), as evidence that Congress assumed that an exhibition meant a nude exhibition. *Protection of Children Against Sexual Exploitation: Hearings before the Subcomm. to Investigate Juvenile Delinquency of the Comm. of the Judiciary*, 95th Cong., 1st Sess. 77-78 (1977), *reprinted in* 1978 U.S.C.C.A.N. 63 (letter from Patricia M. Wald, Assistant Attorney General to James O. Eastland, Chairman, Committee of the Judiciary). After suggesting that "lewd exhibition of the genitals" replace the proposed language, the Assistant Attorney General from the Justice Department stated "Congress could make clear in the legislative history of the bill what types of nude portrayals of children were intended to be encompassed within this definition." *Id.* The letter assumes that Congress only desired to prohibit nude exhibitions because at that time the language of the proposed bill included the word "nudity." By subsequently eliminating the word "nudity," Congress appears to have repudiated its earlier intention to confine the statute's coverage to nude

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2. A subsequent amendment, the Child Protection Act of 1984, replaced "lewd" with the word "lascivious", but the two words have identical meanings. *United States v. Wiegand*, 812 F.2d 1239, 1243 (9th Cir.), *cert. denied*, 484 U.S. 856, 108 S.Ct. 164 (1987).

exhibitions. Further, Congress failed to articulate anywhere in its extensive legislative history any desire that the statute, as enacted, prohibit only nude portrayals.[3]

The underlying rationale for the federal child pornography laws also supports the conclusion that clothed exhibitions of the genitalia are proscribed. When an obscenity statute is challenged as unconstitutional under the First Amendment, the Supreme Court balances the government's interest in protecting the sensibilities of unwilling recipients from exposure to pornography against the dangers of government censorship. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973). Because the government interest, although legitimate, is not compelling, regulation of obscene materials is limited to works which "appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24, 93 S.Ct. at 2615.

The Supreme Court allows the states and Congress greater leeway to regulate and proscribe pornography that depicts minors as distinguished from adults since the harmful effects suffered by a child are palpably more severe. *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348 (1982). The

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3. *See* H.R. Rep. No. 99-910, 99th Cong., 2nd Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952-59; S. Rep. No. 98-169, 98th Cong., 2nd Sess. (1983), *reprinted in* 1984 U.S.C.C.A.N. 492; H.R. Rep. No. 98-536, 98th Cong., 2nd Sess. (1983); S. Rep. No. 95-438, 95th Cong., 2nd Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40-68; H.R. Rep. No. 95-696, 95th Cong., 2nd Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 69-71; H.R. Conf. Rep. 99-910, 99th Cong., 2nd Sess. (1977).

Court relaxes the *Miller* obscenity test when pornographic material portrays minors since the government's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." *Id.* at 756-57, 102 S.Ct. at 3354 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 102 S.Ct. 2613, 2620 (1982)). The use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child. *Id.* at 757, 102 S.Ct. at 3355; *Osborne v. Ohio*, 495 U.S. 103, 109, 110 S.Ct. 1691, 1696 (1990). The psychological effect of visually recording the sexual exploitation of a child is devastating and its elimination of "surpassing importance." *Ferber*, 458 U.S. at 757, 102 S.Ct. at 3355. Since the child's image is permanently recorded, the pornography may haunt him or her for a lifetime because the child will be aware that the offensive photograph or film is circulating through the masses. *Id.* at 759 n. 10, 102 S.Ct. at 3355 n. 10 (quoting Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981)). The crime is the affront to the dignity and privacy of the child and the invasion of the child's vulnerability:

> Human dignity is offended by the pornographer. American law does not protect all human dignity; legally, an adult can consent to its diminishment. When a child is made the target of the pornographer-photographer, the statute will not suffer the insult to the human spirit, that the child should be treated as a thing.

U.S. v. Wiegand, 812 F.2d 1239, 1245 (9th Cir.), *cert. denied*, 484 U.S. 856, 108 S.Ct. 164 (1987).

Additionally, controlling the production and dissemination of child pornography is of paramount importance since pedophiles often use child pornography to seduce other children into performing sexual acts. *Osborne*, 495 U.S. at 111, 110 S.Ct. at 1697.

To vindicate the compelling government interest in protecting the safety and welfare of children, not only is the spectrum of constitutionally unprotected pornographic material broader when the subjects are children rather than adults, but also the arsenal of available enforcement mechanisms is more extensive. For instance, the mere possession of child pornography, even in one's home, may be criminalized although only distribution of obscenity depicting adults can be proscribed. *Compare Stanley v. Georgia*, 394 U.S. 557, 568, 89 S.Ct. 1243, 1249 (1969) (Georgia statute outlawing private possession of obscenity violates the First Amendment) *with Osborne*, 495 U.S. at 108, 110 S.Ct. at 1695-97 (Ohio statute criminalizing possession of child pornography upheld against First Amendment challenge due to the compelling interest in protecting minors).

The harm Congress attempted to eradicate by enacting the child pornography laws is present when a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles. The child is treated as a sexual object and the permanent record of this embarrassing and humiliating experience produces the same detrimental effects to the mental health of the child as a nude portrayal. The rationale underlying the statute's proscription applies equally to *any*

lascivious exhibition of the genitals or pubic area whether these areas are clad or completely exposed.

Knox next asserts that our decision in *U.S. v. Villard*, 885 F.2d 117 (3d Cir. 1989), mandates that the genitals or pubic area be exposed before an exhibition may occur. In *Villard*, we stated that "more than merely nudity" was required for a violation of the statute; otherwise, "inclusion of the term 'lascivious' would be meaningless." *Id.* at 121. The requirement of more than mere nudity does not mean, as Knox contends, that nudity is a prerequisite to the existence of an exhibition; rather *Villard* simply stated the obvious principle that nudity alone is insufficient to constitute a *lascivious* exhibition. No one seriously could think that a Renoir painting of a nude woman or a family snapshot of a naked child in the bathtub violates the child pornography laws. Nudity must be coupled with other circumstances that make the visual depiction lascivious or sexually provocative in order to fall within the parameters of the statute. Such was our holding in *Villard*, which addressed whether sufficient evidence existed to justify a finding of lasciviousness.

Villard is not only consistent with our interpretation of an exhibition, but supports this construction. The *Villard* Court outlined six factors which should be analyzed to determine whether an exhibition is lascivious:

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity;

3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

4) *whether the child is fully or partially clothed, or nude*;

5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. at 122 (emphasis added) (quoting *United States v. Dost*, 636 F.Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom., United States v. Wiegand*, *supra*. The analysis is qualitative and no single factor is dispositive. *Id.* The inclusion of the fourth factor rests on the implicit assumption that a clothed exhibition of the genitals is criminalized under the statute. Since whether a child is fully clothed, partially clothed or naked is one of several factors to be weighed to determine whether an exhibition is lascivious, it follows that an exhibition may occur when a child is fully or partially clothed.

Having analyzed the language of the statute, its legislative history, the underlying rationale for the federal child pornography laws and relevant case law, we conclude that nude exposure of the genitals or pubic area is not necessary for an exhibition to take place.

V.

Interpreting an "exhibition" of the genitals or pubic area to include a clothed display of these areas does not render the statute

unconstitutionally overbroad.[4] The function of the First Amendment overbreadth doctrine is to prevent broadly worded statutes which control constitutionally unprotected conduct from deterring constitutionally protected expression. Invalidating a statute as overbroad, however, is an exceptional remedy and should be employed sparingly and only as a last resort since it is "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916 (1973). Before a child pornography statute is declared unconstitutional, the overbreadth must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615, 93 S.Ct. at 2918. The requirement of substantial overbreadth is equally applicable to challenges that arise in defense of a criminal prosecution. *Ferber*, 458 U.S. at 772-74, 102 S.Ct. at 3363. In *Ferber*, the Supreme Court held that the New York statute which criminalized the "lewd exhibition of the genitals" was not constitutionally overbroad. *Id.* Although some protected expression, ranging from medical textbooks to National Geographic photographs, could possibly be reached by the statute, this tiny fraction of materials within the statute's coverage could be protected by case-by-case analysis. *Id.*

Knox's prediction that our interpretation of an exhibition will result in prosecutors leafing through family albums and church bulletins containing innocent pictures of fully clothed children and pressing charges is unfounded.

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4. The term "pubic area" cannot be challenged as vague or overbroad since Knox contends, and we agree, that this phrase describes a precise anatomical region.

Although our interpretation of an exhibition is expansive, the limiting principle in the statute is the requirement of lasciviousness.[5] A visual depiction of a child, whether the child is clothed or naked, must be lascivious to be proscribed. Whether a depiction is lascivious is essentially a subjective inquiry into whether or not the material is intended to elicit a sexual response from the viewer. *Villard*, 885 F.2d at 122. Only a minuscule fraction of all pictures of minor children will be sufficiently sexually suggestive and unnaturally focused on the genitalia to qualify as lascivious. Even fewer images where a minor's genital area is not fully exposed will constitute a lascivious exhibition since the fact that a child's genital area is covered is a factor militating against a finding of lasciviousness. Thus, including scantily clothed displays of the genitals within the meaning of an exhibition leaves the statute "directed at the hard core of child pornography," *Ferber*, 458 U.S. at 773, 102 S.Ct. at 3363, which results in leaving an indelible psychological scar on the exploited child. Our interpretation simply declines to create an absolute immunity for pornographers who pander to pedophiles by using as their subjects children whose genital areas are barely covered.

VI.

Knox contends that insufficient evidence was presented at trial for a trier of fact to have found,

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5. The issue is not raised in this case, but we note that although the meaning of lasciviousness is far from crystal clear, it is not unconstitutionally vague or overbroad. *See United States v. O'Malley*, 854 F.2d 1085, 1086-87 (8th Cir. 1988); *Wiegand*, 812 F.2d at 1243.

beyond a reasonable doubt, that (1) the Nather tapes traveled through the mail in interstate commerce; and (2) Knox "knowingly" received child pornography through the mail and "knowingly" possessed three pornographic videotapes. Generally, this Court must examine the evidence as a whole in the light most favorable to the government, and must sustain a conviction if there is substantial evidence to support it. *United States v. Lowell*, 649 F.2d 950, 958 (3d Cir. 1981). If a defendant fails to file a timely motion for judgment of acquittal, however, we must review the sufficiency of the evidence only for plain error. *Wright-Barker*, 784 F.2d at 170 (citing *United States v. Manos*, 340 F.2d 534, 537 (3d Cir. 1976)). Since Knox's motion for judgment of acquittal was untimely (*see* discussion *supra* section II), we must determine if the district court committed plain error in reaching its challenged findings. At least one court of appeals has held that this semantic distinction does not alter the analysis because the plain error test and the sufficiency of the evidence standard are essentially equivalent inquiries. *See United States v. Bowie*, 892 F.2d 1494, 1497 (10th Cir. 1990) (although the plain error rule was applicable "the standard actually applied is essentially the same as if there had been a timely motion for acquittal"); 2 Steven A. Childress, *Federal Standards of Review* § 9.12 (2d ed. 1992). We need not determine the precise boundaries of the plain error test since the government fulfilled the more stringent standard - there was sufficient evidence to support the district court's finding that the Nather tapes traveled though the mail and that Knox knowingly received and possessed those films.

To establish interstate mailing, the government introduced evidence that Knox rented a mailbox under a fictitious name and that he received other pornographic materials at that mailbox. When agents searched Knox's apartment pursuant to a valid search warrant, they discovered advertisements from Nather with checkmarks by several video tapes and envelopes, pre-addressed to Nather, with forms to order Nather tapes. One of the videos marked in the catalog was included as a segment of a compilation tape found in Knox's apartment. A carbon copy of a $62 money order payable to Nather was also seized from Knox's apartment. Sixty-two dollars is the approximate price of a single Nather tape. Knox is correct that the government never introduced direct evidence that Nather mailed tapes to Knox's rented mailbox. A trier of fact, however, may consider direct and circumstantial evidence and the reasonable inferences to be drawn therefrom. The above facts provide strong circumstantial support that Nather, a Nevada mail order video company without any offices in Pennsylvania, at some point utilized the postal system to cause the tapes it distributes to be discovered in Knox's apartment in Pennsylvania. We cannot say that it was plain error to ~~conclude that the~~ Nather tapes traveled ~~through the mail~~.

The district court also did not commit plain error by finding that Knox "knowingly" received and possessed the Nather tapes. Knox maintains that the absence of nudity in the films and the disclaimers in the Nather brochures that the videos were legal to purchase and own disproves the mens rea element of section 2252. We have previously held that the mens rea requirement of

section 2252 "does not require that a recipient of child pornography know the precise contents of such materials." *United States v. Brown*, 862 F.2d 1033, 1036 (3d Cir. 1988). In *Brown*, the defendant ordered one film, but accidentally received a different tape. Since the defendant knew the video he requested was child pornography, we deemed it irrelevant that he did not know the exact contents of the substituted tape actually mailed to him.

Knox's argument in this case is somewhat different. He claims that although he knew the contents of the Nather tapes, he was unaware that the videos were child pornography and believed they were legal to own. To address this contention, we look to the Supreme Court's interpretation of a strikingly similar statute for guidance. To fulfill the "knowingly" requirement of 18 U.S.C. § 1461 (the obscenity law concerning adults)[6], the Supreme Court held that the prosecution need only show that the defendant had knowledge of the contents, character and nature of the materials. *Hamling v. United States*, 418 U.S. 87, 123, 94 S.Ct. 2887, 2910 (1974). To require proof that the defendant knew the materials were obscene, and thus illegal to distribute, would allow defendants to avoid prosecution by claiming ignorance of the relevant law. *Id.* It would be ironic to construe the same word, knowingly, in the analogous child pornography law as more lenient to criminal defendants since the purpose for

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6. Title 18 U.S.C. § 1461 (1988) provides in pertinent part: "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section . . . to be nonmailable . . . shall be fined. . . ."

enacting the child pornography statute was to create more stringent regulation for child pornography than already existed through the generally applicable obscenity laws. Therefore, to fulfill the knowledge element of section 2252, a defendant simply must be aware of the general nature and character of the material and need not know that the portrayals are illegal. *See United States v. Moncini*, 882 F.2d 401, 404 (9th Cir. 1989) (no need to prove knowledge of illegality under section 2252); *United States v. Tolczeki*, 614 F.Supp. 1424, 1429 (N.D. Ohio 1985) (same).[7] The child pornography laws would be eviscerated if a pedophile's personal opinion about the legality of sexually explicit videos was transformed into the applicable law.

There is no doubt that Knox was aware of the nature of the Nather tapes when he received them. Newsletters from Nather found in Knox's apartment described the contents of the films, "girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy . . . so revealing it's almost like seeing them naked", and the video's intended effects, "Sassy Sylphs will blow your mind so completely you'll be begging for mercy." Knox handwrote his own descriptions of the Nather films on the outside of the boxes. For instance, on the Nather II tape, Knox wrote

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7. Since it was not raised, we reserve for another day the issue of whether a defendant must know that the subjects of the photograph or film are minors. Although section 2252 does not require that the defendant know the age of the minor, some courts have held that the First Amendment dictates that defendants be entitled to establish reasonable mistake of age as an affirmative defense. *See United States v. United States Dist. Court for Cent. Dist of Cal.*, 858 F.2d 534 (9th Cir. 1988).

"13-year old flashes" followed by "hot." Knox characterizes the second vignette as "15 year old shows nipple." Both Nather's and Knox's descriptions of the tapes clearly demonstrate that Knox was aware that the videotapes contained sexually oriented materials designed to sexually arouse a pedophile. Sufficient evidence was presented at the bench trial to support a finding that Knox was aware of the nature of the Nather tapes, and therefore knowingly possessed and received them.

Even if a reasonable mistake as to the legality of the material was recognized as a defense, the language of the statute is clear that nudity is not a prerequisite for a lascivious exhibition. Additionally, relying on Nather's disclaimer is tantamount to asking a hard core pornographer for legal advice as to whether the material he earns a living by selling is legal. Nather's disclaimer could not reasonably lead Knox to believe that the videotapes were legal. If anything, the need to profess legality should have alerted Knox to the films' dubious legality.

VII.

In sum, we hold that an "exhibition of the genitals or pubic area" pursuant to 18 U.S.C. § 2256(2)(E) encompasses visual depictions of a child's genitals or pubic area even when these areas are covered by an article of clothing. Our construction of the statutory language does not render the statute unconstitutionally overbroad since the requirement of lasciviousness limits the proscribed depictions to constitutionally unprotected expression. Finally, the district court did not commit plain error when it determined that

the prosecution presented sufficient evidence to establish beyond a reasonable doubt that Knox knowingly received and possessed the videotapes and that the films traveled through interstate mail. The judgment of conviction will therefore be affirmed.

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No. 92–1183

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN A. KNOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC. AND APERTURE FOUNDATION, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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No. 92-1183

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN A. KNOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC. AND APERTURE FOUNDATION, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT

The American Booksellers Foundation for Free Expression, the Council for Periodical Distributors Associations, the National Association of Artists' Organizations, the Periodical and Book Association of America, Inc. and Aperture Foundation, Inc. submit this joint brief urging reversal of the decision below. This brief is submitted upon the written consents of counsel to both petitioner and respondent, which are submitted herewith.

THE *AMICI*

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Council for Periodical Distributors Associations is the national trade association for approximately 400 independent local wholesale distributors who distribute over ninety-five percent of all magazines, comic books, paperback books and newspapers in every state of the United States.

The National Association of Artists' Organizations ("Artists' Organizations") is a non-profit, membership service organization dedicated to serving and promoting non-profit organizations engaged in the presentation and support of new and contemporary work on the visual, performing, literary, media, and interdisciplinary arts. Artists' Organizations constitute the primary presenters, supporters, and makers of new and evolving art in America.

The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who

rely on newsstand sales and who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada.

Aperture Foundation, Inc., a not-for-profit corporation, was founded over 40 years ago to foster the fine art of photography. Aperture is dedicated to the presentation of distinguished historical and contemporary photography and to the study of new photographic media, through publishing, exhibitions, research, education and preservation.

INTEREST OF THE *AMICI*

The *amici*'s members publish, produce, distribute and sell books, magazines, videos, works of art and printed materials of all types, including those that are scholarly, literary, artistic, scientific and entertaining. Because *amici's* members include artists, distributors and booksellers who create, distribute and sell popular and potentially provactive literary, scientific and scholarly books and periodicals and art, they have a significant interest in the resolution of the issue before the Court. *Amici*'s members do not own what are commonly referred to as "adult" retail stores; nor do they distribute the "adult" materials that are generally found in such stores. *Amici*'s members do, however, create, distribute and sell mainstream materials that include photographs or depictions of clothed teenagers and younger children in poses that may be considered, in light of the Third Circuit's opinion, lascivious.

Child pornography is properly denounced. Thus, violations of 18 U.S.C. § 2256(2)(E) carry with them enormous social stigma and censure. Until the Third Circuit's ruling, however, *amici*'s members, in their attempts to comply with the statute, could take some limited comfort from the statute's requirement of nudity in determining whether a "lascivious exhibition of the genitals or pubic area" had occurred. The Third Circuit's erroneous conclusion that, under 18 U.S.C.

§ 2256(2)(E), a "lascivious exhibition of the genitals or pubic area" can include clothed minors removes that safe harbor and raises the spectre that *amici*'s members could unwittingly suffer the sting and censure associated with the statute's violation simply by selling provocative materials.

The Third Circuit's expansive reading of the statute places *amici*'s members in a precarious position. Prior to this case, the statute provided the necessary "bright line" test. If the material did not include pictures of sexual conduct or nudity, a distributor or retailer needed to look no further. After *Knox*, a distributor or retailer in the Third Circuit, even absent nudity or sexual conduct, must consider whether photographs include persons under eighteen, and speculate about the effect of such depictions and images upon a reader, as well as about the communicative intent of a publisher of those depictions and images. The Third Circuit has exchanged an arguably workable requirement of "nudity plus" for a test that impermissibly violates the teachings of this Court, the statute and its legislative history; the impact of this erroneous interpretation will be felt by *amici*'s members.

SUMMARY OF ARGUMENT

This appeal raises a question of first impression: can photographic images of fully clothed minors engaged in no sexual activity be the basis of a criminal conviction under 18 U.S.C. § 2252(a)(2) and (4)? The Third Circuit held that petitioner Stephen A. Knox, an honors graduate student in history at Penn State University, violated these statutes by possessing three videotapes purportedly containing "lascivious exhibition of the genitals or pubic areas," although it is undisputed that none of the tapes contained nudity and all minors depicted wore bathing suits, cheerleading outfits, leotards or skirts. The Third Circuit expressly conceded that its holding applied an "expansive" definition of the statutory requirement of an "exhibition." Under that acknowledged "expansive" holding, an "exhibition" can occur when the genitals or pubic

area are fully clothed and those body parts cannot actually be seen by anyone.

The Third Circuit's decision is based on an erroneous interpretation of the statute and its legislative history. The Third Circuit found a violation of the statute based on its "subjective inquiry into whether or not the material is intended to elicit a sexual response from the viewer" — a breathlessly broad inquiry that goes far beyond the language of the statute and impermissibly criminalizes speech protected by the First Amendment. Further, in dispensing with the generally accepted requirement of either nudity or sexual conduct, the Third Circuit misinterprets the statute's legislative history. In support of the Third Circuit's incorrect conclusion that Congress intended to eliminate the nudity requirement, the court erroneously cited a change to the bill, that in fact was intended to ensure that mere nudity without more would not constitute a statutory violation. Finally, the Third Circuit's conceded "expansive" statutory interpretation comports neither with the rule of lenity nor established First Amendment principles of statutory construction.

The Third Circuit's opinion also ignores the straightforward guidance of the leading case on this subject, *New York v. Ferber*, 458 U.S. 747 (1982). Had Congress meant to include photographs of clothed children not involved in sexual conduct within the definition of child pornography, as the Third Circuit has held, such a definition would be beyond the scope of material permitted by *Ferber* to be regulated or banned. *Ferber* defined child pornography as depictions of sexual conduct involving live performance or visual reproduction of live performances. In *Ferber*, this Court specifically discussed the concept of lewd or lascivious exhibition of the genitals, relating it to language in *Miller v. California*, 413 U.S. 15 (1973). The concept of lewd exhibition of clothed genitals is unique to the decision below, and not within the compass of the *Ferber* doctrine.

The Third Circuit's opinion raises serious concerns and the risk of ruinous prosecutions for the mainstream *amici* before this Court. With the removal of nudity as a requirement to a finding of "exhibition," the Third Circuit has significantly expanded the range of materials — books of fine photographs, medical texts, music videos, videos of aerobics, dance and sporting displays, catalogues and even family pictures — which arguably become criminal to own, much less to sell. By its focus on the intended sexual response of the viewer, the Third Circuit's opinion criminalizes non-obscene material that artists create, simply because it is provocative to some.

ARGUMENT

I. THE THIRD CIRCUIT'S CONCLUSION MISCONSTRUES CONGRESS' CLEAR INTENT THAT A DEPICTION OF FULLY COVERED GENITALS AND PUBIC AREA CANNOT CONSTITUTE AN "EXHIBITION OF THE GENITALS OR PUBIC AREA" UNDER 18 U.S.C. § 2256(2)(E).

A. At a Minimum, the Statute Requires Nudity to Constitute "Lascivious Exhibitions of the Genitals or Pubic Area."

Congress' unequivocal intent in enacting 18 U.S.C. § 2256(2)(E) was to preserve constitutionally-protected speech by limiting "lascivious exhibitions" to depictions that include lascivious behavior in addition to nudity. A review of both the statutory language and its legislative history reveals that Congress never intended to criminalize depictions in which the genitals and pubic area are completely clothed.

The statutory language itself evinces Congress' requirement that, to be considered "sexually explicit conduct," a "lascivious exhibition" involves at a minimum a nude depiction of the genitals or pubic area. "Exhibit" means "to show or

display outwardly by visible signs or actions." *Webster's Ninth New Collegiate Dictionary* (Merriam-Webster Inc. 1985). It would be a strange "art exhibition" if all the pictures were hidden by cloth covers. The Third Circuit's conclusion criminalizing depictions of the covered genitals or pubic area, *United States v. Knox*, PA 17,[1] thus contradicts the statutory language because covered depictions are not "outward" displays in which the genitals or pubic area are "visible."

The statute lists "lascivious exhibition of the genitals or pubic area" as one of five examples of proscribed sexually explicit conduct, along with actual or simulated sexual intercourse, bestiality, masturbation and sadistic or masochistic abuse. 18 U.S.C. § 2256(2)(A)-(E). In order to rise to the level of sexual conduct proscribed by Congress, "lascivious exhibition of the genitals or pubic area" must, by its nature, be as explicit as the other defined, sexual acts. The Third Circuit's interpretation proscribing non-nude depictions falls outside the rubric of sexually-explicit conduct prohibited by the statute.

Congress' intent to criminalize depictions containing, at a minimum, nudity and lascivious behavior is further evidenced by the statute's legislative history. Congress specifically addressed and rejected as overbroad standards virtually identical to the one adopted by the Third Circuit. Indeed, Congress made clear that nudity was not only a requirement; nudity alone was insufficient. Something more, a "lascivious exhibition of the genitals and pubic area" was required.

S. 1011 (the "Roth" bill), the original legislative proposal that led to 18 U.S.C. §§ 2251-2257, would have prohibited "[n]udity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may

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[1] References to the Third Circuit's opinion shall cite to Petitioner's Appendix to Petition for Certiorari, taking the form "PA __."

view such depiction." S. Rep. No. 95-438, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 48-49 (hereinafter "S. Rep. No. 95-438 at __"). Congress rejected that nudity standard specifically because it was overly broad. The Senate report recommending passage of the revised bill warned that the nudity standard was "so broad that it could conceivably prohibit such innocent scenes as 'skinny dipping' or even nude snapshots of babies that were mailed to grandparents." *Id.* The Honorable Edward I. Koch, then a Representative from New York, also testified that he would not endorse the nudity standard "because [he was] *concerned about the breadth* of [that] term[]." Cong. Rec. E3419 (daily ed. June 1, 1977) (emphasis added). The Committee on the Judiciary, reporting on the bill, recommended that Congress reject the original bill because "there was a very strong possibility that the courts would declare this section unconstitutional on its face." S. Rep. No. 95-438 at 49.

Thus, Congress expressly discarded the overly-broad nudity requirement in favor of a narrower standard; in no way did Congress "repudiate[ ] its earlier intention to confine the statute's coverage to nude exhibitions," as the Third Circuit held. *Knox*, PA 12-13. The interpretation adopted by the Third Circuit is precisely the type of prohibition both feared and rejected by Congress when it laboriously considered the statute, and will endanger creators, publishers and producers of valuable or mainstream works of art and literature.

The legislative history of 18 U.S.C. § 2256(2)(E) reveals that Congress never considered including non-nude depictions within the scope of the statute. Debate focused instead on which subset of nude depictions fell within the statute's reach. For example, Assistant Attorney General Patricia Wald, in a letter to the Chair of the Judiciary Committee, proposed that the language, subsequently adopted, requiring "lewd [now, lascivious] exhibitions of the genitals" be substituted for "nudity." S. Rep. No. 95-438 at 63 (letter from Assistant Attorney General Patricia M. Wald to Senator James O. Eastland). The

new language was intended to enable Congress to "make clear in the legislative history of the bill what types of nude portrayals of children were intended to be encompassed" within the statutory definition. *Id.*[2] The extensive debates throughout the statute's history do not include a single reference to criminalizing non-nude depictions.[3] The statute must not be read to prohibit non-nude depictions when Congress never considered such a broad application.

Even the prosecutors who testified before Congress, as it considered amendments to the statute, understood 18 U.S.C. § 2256(2)(E) to require more, not less, than mere nudity. Robert Pittler, Bureau Chief of New York's District Attorney's Appeals Bureau, testified that "'lewd exhibition of the genitals' . . . means more than mere nudity and describes a patently offensive, lascivious, lustful or obscene display." *Hearings on S. 2856 Before the Subcommittee on Juvenile Justice of the*

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[2] As an additional example, in the 1984 hearings addressing an amendment that would define "simulated" sexually explicit conduct, Mark M. Richard, Deputy Assistant Attorney General of the Criminal Division, testified on behalf of the Department of Justice that "simulated" sexual activity should be defined to include *off-camera* depictions "of any *uncovered* portion of the genitals or buttocks." Legislative History, Child Protection Act of 1984, House Rep. No. 98-536, *reprinted in* 1984 U.S.C.C.A.N. 492, 504 (emphasis added). Thus, the debate again concerned whether a subset of nude depictions, those "out of view of the camera," could be criminalized, not whether to prohibit non-nude depictions.

[3] *See, e.g., Protection of Children Against Sexual Exploitation Act of 1977*, Legislative History, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40; *Hearings on S. 2856 Before the Subcommittee on Juvenile Justice, a Bill to Amend the Sexual Exploitation of Children Act of 1977*, 97th Cong., 2d Sess. (1982); *Child Protection Act of 1984*, Legislative History, 98th Cong., 1st Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 492; *Child Sexual Abuse and Pornography Act of 1986*, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952.

Committee on the Judiciary, 97th Cong., 2d Sess. 111 (1982). He reiterated this point several times during his testimony, emphasizing that excluding "mere nudity" from the statute helped insure its constitutional application:

> it is important to re-emphasize that neither the present federal statute nor the proposed amendments would encompass acts of *simple nudity*, although there is a prohibition of lewd [now lascivious] exhibition of the genitals. Under the federal statute, *nudity would be encompassed only when it is accompanied by simulated sexual conduct, that is, the explicit depiction of the enumerated acts.*
> * * * By not prohibiting *simple nudity*, the federal statute, like other state counterparts would allow producers ample room to express an idea, convey a message or tell a story about the sexual conduct of children.

Id. at 115-16 (emphasis added).

Similarly, the United States, in other prosecutorial settings, has likewise conceded that nudity is, at a minimum, a requirement here. In litigation concerning the record-keeping provisions of 18 U.S.C. §§ 2251-2257, the United States, through the Justice Department, represented that the statute "does not apply to full frontal nudity. It applies to a very narrow category of lascivious exhibitions of the genitals or pubic area." *American Library Assoc. v. Thornburgh*, No. 89-661 at 42 (D.D.C. 1989) (transcript of April 25, 1989 preliminary injunction hearing). Certainly, if "simple nudity," or even "full frontal nudity," was not to be criminalized according to the government's own interpretation in other contexts, the Third Circuit's prohibition of non-nude depictions flatly contravenes all reasonable interpretations of the statute and its legislative history.

B. Statutory Construction Rules and The Rule of Lenity Likewise Compel Reversal of the Third Circuit.

Established rules of statutory construction require the Court to honor Congress' clear intent to adopt a more restrictive standard that would exclude non-nude depictions from the statute's reach. Where "resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." *Blum v. Stenson*, 465 U.S. 886, 896 (1984). Not only does the Third Circuit's interpretation ignore and contradict Congress' expressed intent to replace the nudity standard with a narrower requirement, it lacks any basis in the statute's extensive legislative history. (*See* Section I.A.) Such a construction violates the judiciary's mandate to honor Congressional intent and jeopardizes the freedom of creators, publishers, producers and sellers of protected materials. *See id.*; *see also Brock v. Pierce County*, 476 U.S. 253, 261-65 (1986) (evaluating Congress' intent when construing statute); *Grove City College v. Bell*, 465 U.S. 555, 563-71 (1984) (evaluating "powerful evidence of Congress' intent" when construing statute).

Further, the Third Circuit's interpretation ignores the time-honored rule that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Liparota v. United States*, 471 U.S. 419, 427 (1985) (citations omitted). *Accord United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2110 n.10 (1992); *Crandon v. United States*, 494 U.S. 152, 158 (1990). Where criminal sanctions are involved, a "fair warning" must be given of what behavior the law will punish. *United States v. Bass*, 404 U.S. 336, 347-48 (1971). The severity of criminal penalties and the accompanying moral condemnation require legislatures and not courts to define criminal activity. *Id.* "Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Id.* Consequently, here, absent any statutory or legislative

authority to criminalize non-nude depictions, the Court must review and reverse the Third Circuit's novel and concededly "expansive" statutory construction. To do otherwise would entangle the Court in the realm of the legislature and would expose unwitting members of *amici* to criminal prosecution without fair warning.

II. THE THIRD CIRCUIT'S OPINION UNCONSTITUTIONALLY EXPANDS THE DEFINITION OF CHILD PORNOGRAPHY BEYOND THAT DECLARED UNPROTECTED IN *FERBER*.

Free speech is essential for the survival of democratic institutions. The First Amendment protects citizens from governmental abridgment of the fundamental right to free speech. Through the years, this Court has specifically defined a limited group of categories of speech that are not protected by the First Amendment. In *New York v. Ferber*, 458 U.S. 747 (1982), this Court added another category to that group by holding that the state has an interest in, and is not constitutionally barred from, regulating non-obscene pornographic depictions of children.

The compelling justification relied on by this Court in *Ferber* to exclude non-obscene depictions of children from the protection of the First Amendment was the need to prevent the sexual abuse of children. *Id.* at 756-64. The expansive definition imposed by the Third Circuit goes beyond the strict limitations imposed in *Ferber* to include depictions where the actions of the minor are neither sexual acts nor lewd, and would not constitute child abuse. Moreover, and particularly important for *amici*'s members as they attempt to comply with the statute, the Third Circuit shifts from applying an objective inquiry to determine the legality of depiction to an exploration of the subjective effect on the observer.

In *Ferber*, the Court specifically required that any legislation proscribing sexually explicit depictions of children (1) expressly define the conduct to be prohibited by applicable state law as written or authoritatively construed, (2) be limited to works that visually depict "sexual conduct" by children below a specified age, (3) suitably limit and describe the sexual conduct proscribed and (4) impose an element of scienter on the part of the defendant.[4] *Id.* at 764-65.

Applying these standards in *Ferber*, the Court found that New York could regulate depictions of "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals" because the "forbidden acts to be depicted [were] listed with sufficient precision and represented conduct. . . that could render it legally obscene." *Id.* at 765. Regulation of works depicting sexual conduct involving "lewd exhibition of the genitals" was permitted because the Court concluded that the scope of that term was both known and permissible. *Id.*

The Third Circuit's analysis violates *Ferber*'s restrictions in two ways: first, by eliminating the requirement of nudity and re-defining the term "exhibition," and, second, by focusing on lasciviousness as the "limiting principle" in the phrase "lascivious exhibition of genitals or pubic area." As a result of these two misapplications of the statute, the Third Circuit has effectively nullified the *Ferber* requirement that categories of sexual conduct be suitably limited and described. *Knox*, PA 19. Further, under the Third Circuit's questionable logic, lasciviousness is a "subjective inquiry into whether or not the material is intended to elicit a sexual response from the viewer." *Id.* If lasciviousness can only be determined by an inquiry into the

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[4] This Court also requires states regulating obscenity to define and describe specifically the sexual conduct being targeted. *Miller v. California*, 413 U.S. 15, 24 (1973).

producer's intent and viewer's reaction, there is no objective structure available to a person reviewing depictions of minors to determine whether those depictions could be deemed child pornography and, thus, fall outside the First Amendment's protection.

The Third Circuit's expansive and subjective inquiry has rendered irrelevant the accepted meaning of "lascivious exhibition of the genitals or pubic area." By defining fully clothed depictions "of the genitals or pubic area" as an exhibition, the Third Circuit ignored the limitations imposed in *Ferber* and created an atmosphere of definitional uncertainty reminiscent of the pre-*Miller* obscenity period when there was no viable standard.[5]

In both *Ferber* and *Miller*, this Court emphasized the need for specificity and definition when regulating depictions of sexual conduct. *Ferber*, 458 U.S. at 764; *Miller*, 413 U.S. at 24. The Third Circuit decision causes the federal statute no longer to meet the *Ferber* requirements of specificity and definition, since it defines "exhibition of genitals or pubic area" as including certain depictions of fully-clothed genitals or pubic areas, based upon their perceived subjective impact on a given individual or group of individuals. *Knox*, PA 17-19. Once the requirement of nudity is removed, a wide range of materials — books of fine photographs, medical texts, music videos, videos

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[5] In addition, the Third Circuit's decision raises a legitimate question with respect to defendant's scienter; before that decision, viewers could reasonably assume clothed depictions of the genitals and pubic area were protected speech. *Cf. United States v. X-Citement Video, Inc.*, Nos. 89-50556, 89-50562, 1992 U.S. App. LEXIS 32542, at *18-24 (9th Cir. Dec. 16, 1992) (finding that lack of scienter requirement renders 18 U.S.C. § 2252, prohibiting distribution, shipping or receipt of child pornography, facially unconstitutional).

of aerobics, dance and sporting displays, catalogues and even family pictures — could fall within the class of child pornography and thus be criminal.

The Third Circuit's expansion goes beyond creating an ambiguous definition of what is banned. This Court allowed New York to ban lewd exhibition of genitals, even though such exhibition did not involve a sexual act, because such an exhibition rose to the level of "sexual conduct." *Ferber*, 458 U.S. at 765. In *Ferber*, when discussing the inclusion of "lewd exhibition of the genitals" as a proper regulation, the Court refers to *Miller*, stating that it was a known and permissible regulation. *Id.* Both sex and nudity were expressly involved in *Miller*. In *Miller*, as in *Ferber*, this Court was attempting to establish clear criteria for states which sought to set limits on the depictions of both "sex and nudity." 413 U.S. at 23-25. Indeed, the Court, shortly after discussing examples of permissible regulation, stated, "[s]ex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places." *Id.* at 25-26.

While nudity can certainly be an aspect of a depiction which is obscene or child pornography, this Court has held that nudity, without more, is protected by the First Amendment. *Osborne v. Ohio*, 495 U.S. 103, 112 (1990). Nudity is inherent in the understanding of lewd or lascivious exhibition of the genitals or pubic area. In *Osborne*, this Court discussed the constitutionality of a statute that sought to criminalize possession of material depicting a minor in "the state of nudity, where such nudity constitutes a lewd exhibition or involves graphic focus on the genitals." *Id.* While Justice Brennan in his dissent sought to strike down the statute for its expansive criminalization of "lewd exhibitions of *nudity*" as opposed to "lewd exhibition of *the genitals*," this Court stated that the critical question is not which parts of the body are *nude* but whether the *nudity* was lewd, for even nude exhibition of the genitals without more would be constitutionally protected. *Id.* at 114 n.11.

The Third Circuit, however, confuses this constitutional mandate, even though one of its earlier holdings specifically recognized that "more than mere nudity" was required for a violation of the federal statute. *United States v. Villard*, 885 F.2d 117, 121 (3d Cir. 1989). In *Villard*, the Third Circuit recognized that the term "lascivious exhibition" was not as specific as the other types of sexually-explicit conduct listed in § 2256(2)(A)-(E). As a result of the term's less-than-definite meaning, the Third Circuit parsed the words "lascivious exhibition," and concluded that "the statute makes clear that the depictions must consist of more than merely nudity; otherwise inclusion of the word 'lascivious' in the statute would be meaningless." *Villard*, 885 F.2d at 121.

In *Knox*, the Third Circuit disregards the requirement of nudity, and ignores its own holding in *Villard*, by stating that "[t]he requirement of more than mere nudity does not mean . . . that nudity is a prerequisite to the existence of an exhibition; rather, *Villard* simply stated the obvious principle that nudity alone is insufficient to constitute a *lascivious* exhibition." *Knox*, PA 16 (emphasis in original). While the Third Circuit is correct when it says nudity alone is insufficient to constitute a lascivious exhibition, it is incorrect and goes beyond any prior holding when it proscribes depictions involving no nudity or sexual conduct at all.

The basis of the proscription in *Ferber* is the protection of minors from sexual abuse. The Third Circuit's unprecedented interpretation, focusing on subjective intent and effect, ultimately eliminates the requirement of sexual conduct and thus ignores the very justification for regulating child pornography — preventing sexual abuse of minors. This is a retreat from the rationale of *Ferber*. Moreover, by focusing the criminal inquiry on the subjective determination of lasciviousness, the Third Circuit has taken a leap backward toward the discredited rule of *Regina v. Hicklin*, L.R., 3 Q.B. 360 (1868), which looked to the

impact of parts of the work on susceptible individuals. It also is an incorrect and impermissible retreat from the teaching of both *Ferber* and *Miller* requiring specificity of definition and, accordingly, the decision below should be reversed.

III. 18 U.S.C. § 2256 AS INTERPRETED BY THE THIRD CIRCUIT IS VAGUE AND OVERBROAD.

If the Third Circuit ruling stands, "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." *Ferber*, 458 U.S. at 768-69 (quoting *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980)). The potential overbreadth is substantial. Any depiction of a child that could be considered sexual in nature would be criminalized. Minors in bathing suits, cheerleading outfits, leotards, skirts, or any attire at all could fall within the statute's scope. The only qualifying element would be whether the depiction is lascivious, which under the decision below is determined in terms of the intent of the producer and the effect on the recipient. A wholesaler, bookstore or video store is thus left with the impossible burden of guessing intent and effect, with the spectre of a criminal child pornography indictment looming over them. Prior to *Knox*, these mainstream businesspersons had a bright line test — sexual conduct or nudity triggered further scrutiny. If the decision below stands, this appropriate and necessary protection is no longer available.

CONCLUSION

For the reasons set forth above, *amici* urge the Court to grant certiorari in this case.

Dated: February 25, 1993

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In the Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN A. KNOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether videotapes that focused on the genitals and pubic area of minor females constituted a "lascivious exhibition of the genitals or pubic area" under the child pornography statutes, 18 U.S.C. 2252, 2256(2)(E), even though those body parts were covered by clothing.

2. Whether the child pornography statutes, as interpreted by the court of appeals, are unconstitutionally vague and overbroad.

3. Whether petitioner had the requisite mental state to violate 18 U.S.C. 2252.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1183

STEPHEN A. KNOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 977 F.2d 815. The opinion of the district court denying petitioner's pretrial motion to dismiss the indictment is reported at 776 F. Supp. 174.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1992. The petition for a writ of certiorari was filed on January 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted on one count of knowingly receiving through the mail visual depictions of a minor engaged in sexually explicit conduct, and one count of knowingly possessing such visual depictions, in violation of 18 U.S.C. 2252(a)(2) and (4). He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed. Pet. App. 1a-25a.

1. In March 1991, the U.S. Customs Service intercepted an order from a company in France for two videos, "Little Girl Bottoms (Underside)" and "Little Blondes." The order requested that the videos be sent to J. Richard Scott, 210 West Hamilton Avenue, No. 108, State College, Pennsylvania. Included was a check drawn on the account of petitioner Stephen Knox and bearing his signature. The check showed Knox's address as 210 East Hamilton Avenue, No. 25, State College, Pennsylvania. The Customs Service that month intercepted a mailing addressed to J. Richard Scott from the Netherlands, which contained a catalog advertising for sale videotapes of nude, semi-clothed, and clothed minors. The Customs Service investigators knew that Knox previously had been convicted of receiving child pornography through the mail. With the help of the Pennsylvania State Police, the Customs agents obtained a search warrant and conducted a search of Knox's apartment. Pet. App. 2a-3a.

Seized from petitioner's apartment were three video cassettes produced by the Nather Company, based in Las Vegas, Nevada. Agents also seized a

catalog from the Nather Company, with checkmarks by several videotape selections, envelopes addressed to Nather, mail order forms from Nather, and a carbon copy of a money order payable to the Nather Company for an amount about equal to the price of a single video. Pet. App. 3a.

The tapes showed various females between the ages of 10 and 17 dressed in bathing suits, leotards, underwear, or other similar attire. The children struck provocative poses, apparently at the direction of someone off-camera. The camera would typically zoom in on the children's pubic and genital area and display a close-up of that area for an extended time. The tapes themselves and the promotional materials distributed by Nather showed that the tapes were designed to pander to pedophiles. For example, one of the advertising catalogs stated (Pet. App. 5a):

> 'Sassy Sylphs' will blow your mind so completely you'll be begging for mercy.
>
> Just look at what we have in this incredible tape: about 14 girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy. There are panties showing under shorts and under dresses and skirts; there are boobs galore and T-back (thong) bathing suits on girls as young as 15 that are so revealing it's almost like seeing them naked (some say even better).

2. In 18 U.S.C. 2252, Congress made it a crime to transport, receive, or distribute any visual depictions that involve "the use of a minor engaging in sexually explicit conduct." It defined "sexually explicit conduct" in 18 U.S.C. 2256(2)(E) to include "lascivious exhibition of the genitals or pubic area of any person."

Based on the videotapes seized from his apartment, petitioner was charged with receiving and possessing child pornography, in violation of Section 2252.

Petitioner moved to dismiss his indictment before trial, on the ground that the videos did not contain an "exhibition" of the genitals or pubic area, since those areas were in all cases covered by clothing. The district court viewed portions of the videotapes that the parties stipulated were representative, and denied the motion. The court reasoned that the uppermost portion of the inner thighs, being in close proximity to the genitals, were included in the definition of "pubic area." Since the upper portion of the inner thigh was clearly exposed in the videotapes, the court held that the tapes contained an exhibition of the pubic area. Pet. App. 4a-5a.

After the court found petitioner guilty on both counts, he filed a motion for judgment of acquittal, along with an affidavit from a physician stating that it is anatomically incorrect to say that the pubic area includes the upper portion of the inner thigh. The district court denied the motion, finding that its filing three months after the entry of the verdict was untimely. Pet. App. 6a.

3. The court of appeals determined that the district court erred in its definition of "pubic area." Displaying any portion of the inner thighs, the court of appeals held, "does not constitute an exhibition of the pubic area under 18 U.S.C. § 2256(2)(E)." Pet. App. 9a. The court of appeals went on to hold, however, that the statute's proscription of a "lascivious exhibition" of the genitals or pubic area did not mean that those body regions had to be nude. *Id.* at 9a-17a. Examining the language of the statute, the court of

appeals noted that the dictionary definition of "exhibit" is "to present to view," "to show publicly," or to "put on display in order to attract notice." The court of appeals found that the visual depictions at issue here clearly put the genitals and pubic area of the young girls "on display." Indeed, the obvious purpose of the tapes "was to 'attract notice' specifically to the genitalia and pubic area." *Id.* at 11a.

An examination of the legislative history of Section 2252 further persuaded the court that Congress did not intend to limit the statute's scope to nude displays. In earlier proposed legislation, it was clear that only nude displays were targeted, for the proposed statute would have proscribed "nudity, which nudity is depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." Pet. App. 11a (citing S. 1011, 95th Cong., 2d Sess. (1977)). Because Congress omitted any reference to nudity in the legislation that was enacted, the court of appeals considered the change to indicate Congress's intention to "criminalize both clothed and unclothed visual images of a child's genitalia if they were lewd." Pet. App. 12a. Nor was there any indication in the extensive legislative history that the statute as enacted was intended to prohibit only nude portrayals. *Id.* at 13a.

The court of appeals also considered the rationale behind the federal child pornography statutes and the particular governmental interest in protecting the safety and welfare of children, and concluded that its interpretation of the statute was consistent with the purpose of the law. The court of appeals concluded (Pet. App. 15a-16a): "The rationale underlying the statute's proscription applies equally to *any lascivi-*

ous exhibition of the genitals or pubic area whether these areas are clad or completely exposed."

The court of appeals further held that its construction did not render the statute unconstitutionally overbroad, because the requirement in the statute that the depiction be lascivious was a sufficient limiting principle. Pet. App. 17a-19a. And because only a very small fraction of all pictures of minor children would be sufficiently sexually suggestive to qualify as lascivious, the court found that the statute was "directed at the hard core of child pornography." *Id.* at 19a (quoting *New York* v. *Ferber*, 458 U.S. 747, 773 (1982)).

The court of appeals also found the evidence sufficient to support the district court's finding that the videotapes traveled through the mail and that petitioner knowingly received and possessed the tapes. Pet. App. 19a-24a.

ARGUMENT

1. Petitioner renews his contention (Pet. 10-22) that the federal child pornography statute does not apply to lascivious depictions of children whose genitals and pubic areas are covered by clothing. There is no conflict among the circuits on this issue, as this case is one of first impression. Further review is therefore unwarranted.

Petitioner claims (Pet. 10-11) that the court erred in finding that the language of the statute covers the visual depictions in this case since, he argues, an "exhibition" of the genitals or pubic area presupposes nudity of the area. But as the court of appeals pointed out, "exhibition" means "put on display," and "[t]he genitals and pubic area of the young girls in the Nather tapes were certainly 'on display' as the

camera focused for prolonged time intervals on close-up views of these body parts." Pet. App. 11a. Just as a foot or hand could be "exhibited" while covered with a sock or glove, so here the genitals and pubic area were "put on display in order to attract notice" to those areas. *Ibid.* (quoting *Webster's Third New International Dictionary, Unabridged* 796 (1976)).

The court of appeals correctly found no indication of any contrary intention in the legislative history. Petitioner cites several comments concerning the original legislative proposal on child pornography, which would have specifically prohibited "nudity * * * depicted for the purpose of sexual stimulation or gratification" (Pet. 12), and he argues that when the language was changed to drop any reference to "nudity," the understanding was still that only nude portrayals would be prohibited. As the court of appeals pointed out, however, the fact that Congress dropped any mention of the word "nudity" in the law as enacted indicates that Congress "repudiated its earlier intention to confine the statute's coverage to nude exhibitions." Pet. App. 12a-13a.

Subsequent legislative history also supports the court of appeals' interpretation. When several amendments to the child pornography statutes were made in 1983, an early version of a Senate bill, S. 57, 98th Cong., 1st Sess., would have defined the word "simulated," a word used but not defined in the then-current law, to mean "the explicit depiction of any ['sexually explicit conduct' as defined] which creates the appearance of such conduct and which exhibits any uncovered portion of the genitals or buttocks." S. Rep. No. 169, 98th Cong., 1st Sess. 13 (1983). A letter

from the Department of Justice criticized this proposed language (*ibid.*):

> We believe that S. 57 defines the term "simulated" too narrowly and that certain conduct excluded by the definition should be included within the law's proscriptions. For example, the child pornography provisions should protect a child against pornographers who would film him or her totally clothed in a body stocking engaging in simulated sexual intercourse with an adult or another child. The harm to children used by adults in this manner to produce pornography is significant even though the child may be clothed. * * * S. 57's definition of "simulated" in our view could prove to be a significant loophole to imaginative pornographers.

The language was then dropped from the amendments that were enacted. The legislative background thus provides support for the court of appeals' conclusion that the term "exhibition" should be given its natural meaning, *i.e.*, not to require that the areas exhibited be nude.

2. Petitioner further argues (Pet. 26-30) that the court of appeals' interpretation of the statute renders it unconstitutionally vague and overbroad. He contends that the Third Circuit's construction of the statute to cover clothed depictions of minors threatens to criminalize a wide variety of innocent and harmless photographs of children. The court of appeals correctly rejected that argument.

The court of appeals found that the federal statute was not vague and overbroad. As the court of appeals stated, "[o]nly a minuscule fraction of all pictures of minor children will be sufficiently sugges-

tive and unnaturally focused on the genitalia to qualify as lascivious." Pet. App. 19a. Furthermore, the court observed that "[e]ven fewer images where a minor's genital area is not fully exposed will constitute a lascivious exhibition since the fact that a child's genital area is covered is a factor militating against a finding of lasciviousness." *Ibid.*; see *United States* v. *Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd *sub nom. United States* v. *Wiegand*, 812 F.2d 1239, 1245 (9th Cir.), cert. denied, 484 U.S. 856 (1987); see also *United States* v. *Wolf*, 890 F.2d 241, 244 (10th Cir. 1989); *United States* v. *Villard*, 885 F.2d 117, 123 (3d Cir. 1989). In short, the court of appeals correctly found that "including scantily clothed displays of the genitals within the meaning of an exhibition leaves the statute 'directed at the hard core of child pornography.'" Pet. App. 19a, quoting *New York* v. *Ferber*, 458 U.S. at 773.

3. Petitioner finally contends (Pet. 22-26) that he lacked the necessary mental state to be found guilty of violating Section 2252, because he had no idea that the depictions he received and possessed were prohibited by the statute. The court of appeals correctly rejected that claim.

Petitioner's claim is essentially that he made a mistake of law, and that no reasonable person would have expected that depictions of the type he possessed would be held to fall within the definition of child pornography. That claim is undermined by petitioner's use of a false name and address in communicating with purveyors of the materials he purchased. Pet. App. 2a-3a. And, as the court of appeals stated, petitioner clearly was "aware that the videotapes contained sexually oriented materials designed to

sexually arouse a pedophile." *Id.* at 24a. Indeed, the promotional brochures made clear that the tapes portrayed children. *Id.* at 5a. This Court said in *Hamling* v. *United States*, 418 U.S. 87, 123 (1974), in the context of an obscenity statute, that it was sufficient to show that the defendant had knowledge of the nature and contents of the materials, and that he need not be shown to know that they were illegal. There is similarly no requirement in the child pornography statutes that the defendant know the materials are illegal. Pet. App. 22a-23a. See also *United States* v. *Moncini*, 882 F.2d 401, 405-406 (9th Cir. 1989).

In light of the explicit descriptions of the materials petitioner ordered and the finding of the courts below that he was aware of the nature of the materials, "he must bear the risk of the potential illegality of his conduct." *United States* v. *Moncini*, 882 F.2d at 405. Although there had not been any prosecutions involving minors who were clothed, or any court decisions reaching the question whether clothed depictions may constitute "lascivious exhibition," there was no decision contrary to the interpretation reached by the court of appeals in this case. Moreover, as the court explained, its interpretation of the statute is supported by the language of the statute, its legislative history, and the underlying rationale of child pornography statutes. In short, "[t]his is not a case where due process prohibits convicting a defendant who has unwittingly broken the law through conduct which an ordinary person would not assume to be at least potentially criminal." *United States* v. *Moncini*, 882 F.2d at 406. Compare *Bouie* v.

City of Columbia, 378 U.S. 347 (1964); *Lambert* v. *California*, 355 U.S. 225 (1957).*

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* The Ninth Circuit has recently held 18 U.S.C. 2252 unconstitutional on its face because of that court's finding that the statute contains no requirement that the defendant have knowledge that the persons depicted in the materials are children. *United States* v. *X-Citement Video, Inc.*, 982 F.2d 1285 (1992). Every other circuit that has considered the question has found to the contrary, either directly or implicitly. See, *e.g.*, *Rodriguez* v. *Clark Color Laboratories*, 921 F.2d 347, 349 (1st Cir. 1990); *United States* v. *Petrov*, 747 F.2d 824, 828-829 (2d Cir. 1984), cert. denied, 471 U.S. 1025 (1985); *United States* v. *Osborne*, 935 F.2d 32, 34 & n.2 (4th Cir. 1991); *United States* v. *Marchant*, 803 F.2d 174, 176-177 (5th Cir. 1986); *United States* v. *Johnson*, 855 F.2d 299, 306 (6th Cir. 1988); *United States* v. *Duncan*, 896 F.2d 271, 277-278 (7th Cir. 1990); *United States* v. *LaChapelle*, 969 F.2d 632, 638 (8th Cir. 1992); *United States* v. *Garot*, 801 F.2d 1241, 1246-1247 (10th Cir. 1986). A rehearing petition is pending in the *X-Citement Video* case, and petitioner does not argue that Section 2252 lacks a scienter requirement. Moreover, it is clear in this case that petitioner knew both the nature and character of the contents of the tapes he ordered, as well as the fact that the persons depicted on the tapes were minors.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1993

STEPHEN A. KNOX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. Whether there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing.

II. Where no other prosecution has ever been brought and no other arrest has ever been made charging an exhibition of the genitals which were fully covered by an article of clothing, and the defendant knew that the videotape contained no nudity and was told that the videotape was therefore legal, did the government introduce sufficient proof of *scienter* to support a guilty verdict?

III. Where no other prosecution has ever been brought and no other arrest has ever been made charging an exhibition of the genitals which were fully covered by an article of clothing, is an objectively reasonable belief in the legality of the depiction a valid affirmative defense?

IV. Assuming *arguendo* that there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by clothing, is 18 U.S.C. § 2256(2)(E) unconstitutionally vague and overbroad?

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The opinion of the Court of Appeals for the Third Circuit is reported in *United States v. Knox*, 977 F.2d 815 (3d Cir. 1992). PA 1-25.[1] The opinion of the district court denying Knox's pretrial motion is reported at 776 F. Supp. 174 (M.D. Penn. 1991).

JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment on October 15, 1992, affirming petitioner Stephen A. Knox's conviction for receipt and possession of child pornography as proscribed by 18 U.S.C. § 2252 *et seq.* A petition for a writ of certiorari was filed within ninety (90) days of judgment by the Third Circuit, and certiorari was granted on June 7, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, § 2252(a)(2)[2] and (a)(4)(B) provide in pertinent part:

(a) Any person who –

(2) knowingly receives . . . any visual depiction that has been mailed . . . in interstate

---

[1] "PA" is Appendix to the Petition for Certiorari. (A is a citation to the Appendix filed in the Third Circuit.)

[2] This statute was recently held to be unconstitutional on its face *United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir., 1992).

or foreign commerce, or which contains materials which have been mailed . . . if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(4) either –

(B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed . . . in interstate or foreign commerce, or which was produced using materials which have been mailed . . . if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct:

shall be punished as provided in subsection (b) of this section.

Title 18, United States Code, § 2256(2) provides in pertinent part:

For the purposes of this chapter, the term –

(2) "sexually explicit conduct" means actual or simulated –

(A) sexual intercourse . . . ;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Stephen A. Knox was convicted on one count of receiving depictions of minors engaged in "sexually explicit conduct" under 18 U.S.C. § 2252(a)(2) and § 2256(2)(E) and one count of possessing three or more items containing a depiction of minors engaged in "sexually explicit conduct" under 18 U.S.C. § 2252(a)(4)(B) and § 2256(2)(E), based solely on three videotapes containing videotaped sequences sold by a Nevada-based company, Nather, Inc. ("Nather").

Although none of the minors depicted in the videotapes were shown to be engaged in any actual or simulated sexual conduct as proscribed by 18 U.S.C. § 2256(2)(A), (B), (C), or (D), and all genitals were fully covered, the district court agreed to decide – and then denied – a pretrial motion to dismiss based upon the contents of the videotapes. The underpinning of the district court's denial was a finding that the uppermost portion of the inner thigh was the "pubic area". Since the pubic area was exposed (nude), the district court reasoned, a prosecution based on an exhibition of the pubic area – not the genitals – was statutorily authorized:

> Although in every instance the girl's genitals were covered by either underpants or a bathing suit, the area in close proximity to the genitals, specifically the uppermost portion of the inner thigh area closest to the girl's genitals, was clearly exposed.

United States v. Knox, supra, 776 F. Supp. at 180.

At a subsequent bench trial, the trial judge found that the "exhibitions" were "lascivious" and had been received by Knox in the mails. Knox was convicted and, on February 13, 1992, sentenced to the mandatory minimum sentence of five (5) years imprisonment.

On October 15, 1992, the Third Circuit found the district court in error because "[d]isplaying any portion of the inner thighs does not constitute an exhibition of the pubic area under 18 U.S.C. § 2256(2)(E)." *United States v. Knox, supra,* 977 F.2d at 819-820. (PA 9). However, the Third Circuit affirmed Knox's conviction, holding that displaying *fully covered* genitals *does* constitute an "exhibition" under 18 U.S.C. § 2256(2)(E).

B. Statement of Facts

1. The Defendant

Petitioner Stephen A. Knox is an honors graduate student working on his doctorate in history at Pennsylvania State University, where he has maintained a 4.0 average since his admission in the Fall of 1990. (A 81). He graduated summa cum laude in 1986 with a bachelors degree from Temple University. (A 80). Knox was described by his graduate adviser, Dr. Nan Elizabeth Woodruff, as a serious student who has, throughout his

case, maintained the rigorous work load required of him. Dr. Woodruff attested to the fact that Knox "easily ranks among [the] top five graduate students" at Penn State. (A 82). Similarly, Professor William A. Blair found Knox to have "enriched the graduate community at Penn State" and to have taken substantial initiative in gaining a mastery of his subject matter. Professor Blair also noted Knox's high motivation to achieve success in his chosen profession as an historian and the equally high likelihood that he will do so. (A 83).

Although Knox was previously convicted for receiving "child pornography" sold to him by a government sting operation, he has carefully and faithfully obeyed the terms of his probation, which has included attending therapy sessions on a regular basis. Relying heavily on the psychological evaluation of Dr. Fred Covan, Chief Psychologist at Bellevue Hospital in New York (A 84 to 88), the trial judge concluded that there is *"absolutely no evidence of any inclination by the defendant of untoward conduct toward anyone else"* and granted Knox bail pending appeal. (Emphasis added.) (ST 28 to 29)[3]

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[3] Three transcripts comprise the entire record in this case. Testimony and argument on the motions on August 28, 1991, are contained in the motion transcript, or "MT". The November 14, 1991, trial has the usual designation of "T". Sentencing and argument on the post-trial motions on February 13, 1992, are contained in the sentencing transcript, or "ST".

2. The Videotapes

Each of the three two-hour-long videotapes[4] seized from Stephen Knox's home consists of up to several dozen sequences from a few to fifteen minutes in length. The sequences are "dubs" from videotapes sold by Nather, as evidenced by Knox's hand-written notations on each of the videotape boxes reflecting numerous titles advertised in the Nather brochures, and as demonstrated by the fact that the length of each videotape sold by Nather is considerably less than two hours.[5]

Shown in the videotaped sequences are apparently amateur models in poses no different from what one would commonly find in fashion magazines[6] or see on television in gymnastics meets, or on *Star Search* or *America's Funniest Home Videos*. There are also depictions of children horsing around, sitting in parks, and swinging on swings. The children's costumes and leotards, short shorts and skimpy bathing suits (worn by the older teenage models), frilly socks, and the biker shorts with lace trim[7], are utterly commonplace in American society and appropriate to the ages of the minors wearing them.

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[4] The three videotapes and the boxes containing Knox's handwritten notations were marked into evidence and made part of the record as Government Exhibits 5, 6, and 7, respectively. (MT60).

[5] *See* the Nather brochures marked into evidence as GX-1 and made part of the record. (T9).

[6] Fashion magazines, such as *Vogue* and *Seventeen*, routinely feature teenaged girls "alluringly" posed in order to sell a variety of clothing and other products.

[7] Knox erroneously labeled these on one of the videotape boxes as "sexy garters". *See* videotape marked Nather #3, made part of the record at MT60.

Except for one sequence (discussed below), no girl depicted in the videotapes is engaging in conduct which could be characterized as overtly sexual. Any sexuality is implied, sometimes by the natural or feigned sensuality of the models, sometimes by the models' manner of dress (e.g., the skimpy bathing suits and short shorts of the older teenagers), and by the videographer's "zooming in" on the girls' uncovered legs and the clothing covering the genitals, buttocks, and breasts. The "pantie [sic] flashes" which Knox noted on the videotape boxes are nothing more than a model fluffing the hem of her skirt or the videographer moving lower or shifting position in an attempt to catch a glimpse of her underwear. In reality, the minors in the tapes are doing nothing (at the direction of anyone else or of their own accord) which anyone standing five feet away would consider "lascivious" or overtly sexual.

The only sequence in the videotapes in which a girl intentionally opens her legs to show her panties is an excerpt from the French movie, *Le Grande Chemin* (The Grand Highway – 1988), a general release (not an "adult") movie which had a successful run at foreign film houses throughout the United States and is available for home viewing on videocassette at most major video outlets.[8] There is no question but that the 11-year-old girl in *Le Grande Chemin* was directed to spread her legs in order

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[8] The sequence is contained on the videotape marked *Nather* #2, made part of the record during the pre-trial hearing as Government's Exhibit 6. (MT60)

to show her panties – as witnessed by the dialogue, translated in the subtitles which flash across the screen (and are reported here verbatim):

Dirty boy! Why do you always stare at my pants?

I don't. You keep showing them.

Liar! I saw you when I was in the tree! Admit it, you're curious! You've never seen a girl's wee wee, I bet!

Yes I have.

I bet you haven't! Want me to show you?

Yours? Are you kidding?

Come and see! Free of charge! Promise not to tell a soul!

The fact that this sequence was excerpted from a popular film highlights both the vagueness and overbreadth problems which arise from the Third Circuit's expansive interpretation of 18 U.S.C. § 2256(2)(E).

3. The Pretrial Motion

The district court granted a pretrial hearing on the issue of whether the three videotapes could be found to depict minors engaging in "sexually explicit conduct" under the statute, despite the fact that the minors' genitals were completely covered by clothing. Because the defendant waived his right to a jury trial, the Court agreed to rule upon an issue usually reserved for trial. *Knox, supra,* 776 F. Supp. at 178-179. The trial court observed that "[t]his is a case of first impression." *Id.* at 180. The government conceded at the hearing (MT 66 to

69) and has conceded throughout this litigation that this is the very first prosecution based upon an exhibition of the genitals or pubic area covered by clothing. (*Brief for the United States in Opposition to Petition for Certiorari*, p. 10). It is undisputed that nude genitals are never depicted in the three videotapes.

The trial judge acknowledged that the government's theory at trial rested upon an exhibition of the pubic area, rather than the genitals. In denying Knox's pretrial motion, the judge adopted a scientifically incorrect view that the uppermost portion of the inner thigh was part of the "pubic area" and – since the inner thigh was exposed (nude) – found that the three videotapes contained an "exhibition" under § 2256(2)(E). The court left for trial its determination of whether the exhibitions were "lascivious". *Knox, supra*, 776 F.Supp. at 180.

4. The Bench Trial

At the bench trial on November 14, 1991, all of the testimony and exhibits on the motions to suppress and dismiss were incorporated for purposes of the trial. (T 3). The government introduced advertisements and a catalog for videotapes from Nather, with an address in Las Vegas, Nevada. The government offered envelopes, found at Knox's apartment, which bore Nather's address. These envelopes were printed and provided by Nather to be used in ordering material. A $62 Traveller Express money order to Nather, dated June 4, 1990 (twenty-two (22) months prior to the dates on which the indictment alleged the crime was committed) was also introduced. (T 6 to 7).

The government's sole witness, a Customs agent, testified that Knox had rented a mail box at Mail Box Etc. under the name of J. Richard Scott, several months *after* the money order to Nather was written. (T 7 to 9). On cross-examination, the agent acknowledged the possibility that the videotapes seized from Knox's apartment were "dubs", i.e. not the original tapes made and distributed by Nather. (T 11). The agent also acknowledged that he had no evidence that any materials were ever received by the defendant at the mail box. (T 12).

The defense offered into evidence various issues of *Video Magazine*, which contained Nather advertisements (T 15 to 16). The government offered copies of Nather brochures, seized from Knox's apartment, which proclaimed that the tapes were legal and contained no nudity or sexually explicit conduct. (MT 51). The defense argued in summation that the government had failed to prove the element of mailing, the necessary *mens rea*, and adopted the other arguments previously made at the pretrial hearing. (T 17 to 20).

5. The Verdict

The court filed a written pleading on November 15, 1991, finding the defendant guilty on each count (without reasons), ordered a pre-sentence investigation, and set sentencing for February 13, 1992, at 1:00 p.m.

6. Post-Trial Motion

Prior to sentencing, Knox filed a motion for verdict of acquittal or, in the alternative, for a hearing to explore

further "the relationship of the medical and anatomical authorities to the intent of Congress" (A 51 to 55). The motion was supported by an affidavit of Dr. Todd Olson, Director of Human Gross Anatomy at the Albert Einstein College of Medicine, establishing the indisputable fact that the uppermost portion of the inner thigh is not the pubic area.

The trial judge denied the motion (A 58 to 60), and sentenced Stephen Knox to the minimum mandatory five (5) year term. (ST 22 to 24).

7. The Government's Shifting Theories

In Stephen Knox's opening brief to the Third Circuit, the issue upon which the Third Circuit decided the case and upon which this Court granted certiorari – whether genitals which are covered by clothing could be an exhibition within the meaning of 18 U.S.C. § 2256(2)(E) – was not even addressed. Nothing in the litigation in the District Court suggested that the government had urged such a position. In the *responding* brief to the Circuit, the government obliquely raised the issue, which was then addressed for the first time by Knox in his reply brief.

> Throughout its response, whether by accident or design, the government implicitly *assumes* there can actually be an 'exhibition' of the genitals or pubic area as required by 18 U.S.C. § 2256(2)(E) without nudity. When that assumption is finally articulated, the government provides no jurisprudential support. The government's entire argument is expressed in one sentence: '[N]or can it be seriously contended that there cannot

> be a lascivious exhibition of the genital area absent nudity.' (Rb 35-1). (Footnote omitted).

Reply Brief at 1[9].

SUMMARY OF ARGUMENT

Petitioner Stephen A. Knox was convicted for receipt and possession of three videotapes which contain depictions of a type which no court anywhere (either state or federal) has ever found criminal since the first federal child pornography laws took effect on February 1, 1978, fifteen years ago. The government has conceded that this is the first prosecution where it has been alleged or argued that genitalia that are completely covered by clothing can still be "exhibited".

The Third Circuit's admittedly expansive interpretation of 18 U.S.C. § 2256(2)(E)'s term "exhibition of the genitals or pubic area" to include images of minors whose genitals and pubic areas are fully covered by clothing avoids the plain meaning of the statute, violates the Rule of Lenity, contravenes the legislative history, and creates a vague and overbroad interpretation of that criminal statute.

The meaning of the word "exhibit" is clear. "To exhibit" means to show or present to view, to expose. "Expose" means to uncover or bare to the air. The antonym for "exhibit" is to conceal, which means to cover

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[9] "Rb" refers to the government's responding brief in the Third Circuit. "Reply brief" refers to Petitioner's Reply brief in the Third Circuit.

or keep from sight. Thus, covered genitals cannot be exhibited. An "exhibition of the genitals" "even when those areas are covered by an article of clothing" is literally a contradiction in terms and does violence to the plain meaning of the statute.

The legislative history of 18 U.S.C. § 2256(2)(E) makes it clear that Congress has always considered nudity to be a requirement before depictions could be found to be criminal. The entire legislative discussion demonstrated that proscribing "mere nudity" was too drastic a measure and that Congress sought a more limiting definition to limit an "exhibition". Congress thus limited the *type* of nudity criminalized by the statute by proscribing only "exhibitions of the genitals or pubic area" and adding the word "lewd" (later amended to "lascivious"). It is beyond obvious from a review of the legislative history that the statute passed by Congress was meant to narrow the category of depictions which fell under the statute's proscription, not to broaden it.

The Third Circuit admitted its definition of "exhibition" was expansive. *United States v. Knox, supra,* 977 F.2d at 823 (PA 19). The Rule of Lenity, intended to prohibit a judicial construction which criminalizes conduct beyond what Congress specifically intended, prohibits the expansive definition of "exhibition" adopted by the Third Circuit.

The Rule of Lenity is also designed to give fair notice to citizens of what conduct is criminal. The government has zealously enforced the child pornography statutes since they were first passed some fifteen years ago. Yet, this is the very first prosecution ever undertaken under

the theory that there can be an "exhibition" of genitalia which are completely covered by clothing. The result is that Knox has been convicted of conduct neither he nor anyone else could possibly have known was criminal.

In finding Knox guilty of "knowingly" receiving and possessing "child pornography", the Third Circuit applied a standard of *scienter* which is inapplicable to the facts of this case. Because Knox knew that the tapes contained no sexually explicit conduct violating 18 U.S.C. § 2256(2), (A), (B), (C), and (D), and no nudity, he had an objectively reasonable belief that they contained no lascivious exhibitions of the genitals, 18 U.S.C. § 2256(2)(E) and were therefore legal, not child pornography.

Given the substantial First Amendment rights at stake, the serious penalties faced by defendants convicted for child pornography crimes, the enormous social stigma attached to those even accused of the crime, and the widespread chilling effect on protected First Amendment conduct, such an overbroad reading of the child pornography statute cannot constitutionally stand.

The Third Circuit's expansion of the child pornography law will have a chilling effect upon legitimate publishers and contravenes the limitations on such laws set forth in *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Worse, the government will have an unlimited charging power. Depictions of minors in bathing suits, leotards, shorts, underwear, and other similar clothing are created every day and may be found everywhere throughout society. The Third Circuit's decision places such depictions into a "grey area" where a

decision to prosecute may rest on the government's subjective view of the potential defendant, and is limited only by a "far from crystal clear" requirement of "lasciviousness". *United States v. Knox, supra,* 977 F.2d at 823 fn. 5. (PA 19).

ARGUMENT

A. There can be no "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing.

The depictions of minors contained on the Nather tapes clearly fall outside the "hard core of child pornography" at which the federal law is directed. *New York v. Ferber, supra,* 458 U.S. at 773, 102 S.Ct. at 3363. It is not open to dispute that the videotapes in *Knox* did not depict "sexually explicit conduct" as defined in 18 U.S.C. §§ 2256(2)(A) through (D). Neither is there any depiction of nudity, even in part, of the genitals or pubic area of any person. As both the District Court and Third Circuit decisions emphasize, in every instance in the Nather tapes, the minors' genitals are fully and opaquely covered by an article of clothing.

It must be reemphasized that there is nothing inappropriate about the bathing suits, leotards, costumes, school uniforms, skirts or dresses worn by the subjects in the Nather tapes. The minors are dressed in the manner one commonly sees them in school or at play, walking down the street, performing gymnastics, or swimming.

1. The "Plain Meaning" of the Statute

18 U.S.C. § 2256(2)(E) defines "sexually explicit conduct" to include a "lascivious exhibition of the genitals or pubic area of any person". If the word "exhibition" has any meaning at all, it is that the object being "exhibited" must actually be seen. "Exhibition" means "an exhibiting, showing or presenting to view," and "exhibit" means "to offer or *expose to view*; present for inspection". (Emphasis added). *Random House Dictionary of the English Language* (Unabridged), 1979. "Expose" means "to uncover or bare to the air, cold, etc.; to present to view, exhibit, display," and "view" means "to see, behold". *Id.* The sole antonym listed in the *Random House Dictionary* for "exhibit" is "conceal," a word which means "to *cover* or keep from sight." *Id.* (Emphasis added). From these definitions, the conclusion is inescapable that the statute proscribes only depictions in which genitals or pubic areas are exposed to view, uncovered, or bared to the air. Genitals which are concealed – that is, fully covered by an article of clothing – cannot, by definition, be exhibited. Thus, the Third Circuit's finding that § 2256(2)(E) criminalizes "exhibitions" of the genitals or pubic areas "even when these areas are covered by an article of clothing" is literally a contradiction in terms. *United States v. Knox, supra,* 977 F.2d at 825 (PA 24).

Had the Third Circuit applied the plain meaning of the word "exhibition", rather than giving the term an admittedly "expansive" interpretation[10], it would have concluded that some exposure of the genitals or pubic

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[10] See *United States v. Knox, supra,* 977 F.2d at 823. (PA 19).

area – that is, full or partial nudity – is a prerequisite for the occurrence of an exhibition. One could not conceive of an "exhibition" of sculpture or painting in which all the artwork was fully and opaquely covered, incapable of being viewed. Likewise, there can be no "exhibition of the genitals or pubic area" where these parts of the body are covered by clothing.

The Third Circuit's characterization of the federal statute as criminalizing "clothed and unclothed visual images of a child's genitalia if they were lewd" (PA 12a) or "scantily clothed displays of the genitals" (PA 19a), highlights both a semantic and a logical problem with that court's decision. It is not visual images or displays which are clothed or nude, but genitals themselves. The Third Circuit's reasoning would require that the term "clothed and unclothed" denote types or subsets of "genitals" – which is clearly not the case. Nor does "clothing" form a part of the genitalia. Under the federal statute, it is only depictions of genitals which can be proscribed, if such depictions are also found to be "lascivious". Concealing the genitals under clothing therefore prevents the application of the federal statute, regardless of whether the manner of concealment might be deemed to be "lascivious" in nature.[11]

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[11] The Third Circuit's use of the phrase "scantily clad" in describing the clothing of the minors depicted in the Nather tapes is clearly rhetorical, as the garments worn by the models are generally socially-acceptable and age-appropriate.

2. The Legislative History

The legislative history of 18 U.S.C. § 2252 *et seq.* makes absolutely clear Congress' intent to criminalize only those depictions of children whose genitals or pubic areas were nude *and* who were engaged in exhibiting their genitals or pubic areas in a "lewd" (now "lascivious") manner.

The original legislative proposal introduced by Senator Roth in 1977, S. 1011 (the "Roth" bill), would have criminalized "nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." That provision was roundly criticized by lawyers who testified before Congress, as well as by the Justice Department. A letter dated June 14, 1977, from Assistant Attorney General Patricia Wald to Senator Eastland, then-Chairman of the Committee on the Judiciary, specifically recommended that

> The term "nudity . . . depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction" is also troublesome. This definition differs from the "average person" test for obscene material set forth in *Miller v. California, supra,* and it would be difficult to determine by what standard the "sexual stimulation or gratification" could be assessed. We would suggest as an alternative definition "lewd exhibitions of the genitals," a phrase used by the Chief Justice in *Miller v. California, supra,* to describe one of a variety of types of conduct which could be prohibited under state obscenity statutes. Congress could make clear in the legislative history of the bill

> *what types of nude portrayals of children* were intended to be encompassed within this definition.

(Emphasis added.) *Protection of Children Against Sexual Exploitation,* Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, United States Senate, 95th Congress, First Session, May 27, June 16, 1977, pp. 77-78.

Congressman Edward I. Koch also warned that he would not endorse the nudity standard proposed in the Roth bill because he was "concerned about the breadth of [that] term." *Congressional Record,* House, E. 3419 (daily ed. June 1, 1977) (statement of Rep. Koch).

The Justice Department recommendation to narrow the proposed ban on nudity was adopted by Senators Mathias and Culver in drafting S. 1585 (the "Mathias-Culver" bill). The difference between the Roth and Mathias-Culver bills was the subject of University of Pennsylvania Professor Paul Bender's extensive testimony before Congress. Professor Bender, also former general counsel to the President's Commission on Obscenity and Pornography (1970), testified why the Mathias-Culver bill was preferable to the Roth bill vis-a-vis 18 U.S.C. § 2256(2)(E):

> Most importantly, is the definitional section of the Roth bill. It uses the conduct which it prohibits as having children engage in prohibited sexual acts and then it defines the prohibited sexual acts in a number of ways. Most of these definitions are okay. But some of them strike me as vague and so vague as to perhaps be unconstitutional. . . . The nudity provision is a little bit

> troublesome also. It says, "nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." I have a problem with that in knowing whose purpose they are talking about and when that has to be the purpose. Is the notion of this that the person taking the picture has to take the picture for the purpose of stimulating or gratifying someone else sexually, or is it enough if the picture is simply used that way for that purpose by somebody later, even if that was not the purpose of the person who took the picture?
>
> Nudity generally, I think, may be a bit overbroad in terms of the purposes of the legislation. I would not want to classify as child abuse anyone who takes a picture of a child without any clothes on. Lots of people do that of their children. They send it to the child's grandparents in interstate commerce. I don't think you would want to cover that. *So I think it's right to qualify "nudity." But this qualification [in the Roth bill] strikes me as vague."*

(Emphasis added.) *Protection of Children Against Sexual Exploitation*, Hearings, *supra*, p. 103.

In other words, Professor Bender understood the phrase "lewd exhibition of the genitals," contained in the Mathias-Culver bill, as a qualification – and a narrowing – of the broader term "nudity". It was, *in fact*, a qualification and a narrowing, because by limiting the scope of the proscription on nudity to "lewd exhibition of the genitals or pubic area," Senators Mathias and Culver ruled out banning other types of nude portrayals, e.g.

those which were merely nude "without more" or those in which breasts or buttocks were lewdly exhibited.

Given this legislative history, the Third Circuit's claim that Congress "omitted any reference to nudity in the legislation that was enacted" and therefore "intended to criminalize both clothed and unclothed visual images of a child's genitalia if they were lewd" is disingenuous at best. In passing the Protection of Children Against Sexual Exploitation Act of 1977, Congress adopted the Mathias-Culver language ("lewd exhibition of the genitals") rather than the Roth language ("nudity, for the purposes of sexual stimulation . . . ") precisely because the Mathias-Culver language delineated, as "sexually explicit conduct", a sub-category of nudity to be proscribed. Congress has never acted to expand that proscription.

As used in the statute, the phrase "lewd exhibition of the genitals" has a common sense meaning: it refers to a type of sexual conduct on the part of the model depicted which is designed to exhibit and draw attention to his or her genitals. Such was the understanding of members of Congress and witnesses who appeared before it in hearings in 1982, when Congress was considering amending the child pornography statute in light of *New York v. Ferber* to remove the requirement that depictions of minors engaged in "sexually explicit conduct" be obscene in order to be proscribed. Senator Specter, mindful of the problems of constitutional overbreadth which might be posed by an outright ban on non-obscene depictions of "lewd exhibition[s] of the genitals or pubic area," proposed that such exhibitions continue to be protected if they possess literary, artistic, or scientific merit.

In discussing this proposal, Bruce Rich, on behalf of the Association of American Publishers, suggested that the exception should apply to the entire range of "sexually explicit conduct," not merely to "lewd exhibitions of the genitals." Mr. Rich, like the members of Congress who were considering changes in the law, correctly assumed that the phrase described a *type* of nudity:

> We say, first, that it is not enough merely to tag on the literary, etc., exception to *exhibitions of nudity*, as Senator Specter's own proposal would suggest. . . . We would suggest having the literary, artistic, etc. exemption to modify the entire range of conduct which would be otherwise prohibited.

Child Pornography, Hearing before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, United States Senate, 97th Congress, December 10, 1982. Serial No. J-97-152, pp. 19-20.

Robert Pitler, Bureau Chief, Appeals Bureau, District Attorney's Office for New York County, who argued the *Ferber* case before the Supreme Court and afterwards on remand to the New York Court of Appeals, also understood "lewd exhibition of the genitals" to encompass nudity when, during the Congressional hearings, he criticized the arguments of *amici* in the *Ferber* case. The term "lewd exhibition of the genitals," Mr. Pitler observed,

> means more than mere nudity and describes a patently offensive, lascivious, lustful or obscene display. . . . [A]mici publishers, for the most part, based their conclusion on a misunderstanding of the term "lewd exhibition of the genitals," which, as noted, does not include mere nudity.

Child Pornography, Hearing before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, United States Senate, 97th Congress, December 10, 1982. Serial No. J-97-152, pp. 111-113.

In 1986, when Congress again contemplated amending the child pornography laws, comments by Senator Roth accurately reflect that what Congress had intended to criminalize in 1977 were *nude* depictions of a certain character. Senator Roth, speaking in support of H.R. 5560, the "Child Sexual Abuse and Pornography Act of 1986," the House counterpart to his bill, S. 2398, correctly referred to "child pornography" as "photos, films and videotapes depicting *nude* young children *engaged in explicit sexual behavior*". (Emphasis added.) *Congressional Record*, Senate, S. 17296 (daily ed. October 18, 1986) (Statement of Sen. Roth).

The Supreme Court has used the phrase "lewd exhibition of the genitals" to denote exhibitions where the genitals are visible, i.e., nude, and in which the subject is engaging in some sort of conduct intended to draw attention to his or her exposed genitals in a sexual manner. In *New York v. Ferber*, *supra*, 458 U.S. at 762-3, 102 S.Ct. at 3357, Justice White observed that

> It is unlikely that visual depictions of children . . . lewdly exhibiting their genitals would often constitute an important and necessary part of the literary performance or a scientific or educational work.

Nowhere in the entire legislative history of the child pornography laws, as amended over a period of fifteen years, is there *any* discussion by *anybody* which would

indicate that videotapes which depict minors whose genitals are completely covered could be criminalized. Moreover, all of the discussions regarding "lewd" or "lascivious exhibition of the genitals," reflect a consensus that the phrase was intended to narrow the type of nudity which was to be criminalized.

3. Precedent

In fifteen years of zealous enforcement of the federal child pornography laws, no person other than Stephen A. Knox has been indicted or convicted for receiving or possessing depictions of minors whose genitals and pubic areas are fully covered by clothing. Nor has any person been indicted or convicted for producing such depictions. Even if it could be argued that the plain wording of the statute proscribes depictions of minors whose genitals and pubic areas are fully covered by clothing, the fact that there have been no prosecutions other than that of Stephen A. Knox[12] demonstrates that such is not the general understanding of the Department of Justice, law enforcement officials, U.S. Attorneys, and the public at large. This is especially true, where, as here, the very producer and seller of the vignettes contained on the videotapes in question carried out its business openly and for at least several years through nationally-prominent publications without suffering criminal prosecution. (T.13-16 to 14-17.)

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[12] The government concedes that this is the sole prosecution for depictions of minors whose genitals and pubic areas are fully covered. *Brief for the United States in Opposition to Petition for Certiorari*, p. 10.

The sole authority relied upon by the Third Circuit for holding that depictions of minors whose genitals are fully covered may be proscribed under § 2256(2)(E) is *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986) *aff'd sub. nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir.), *cert. denied*, 44 U.S 856 (1987). In *Dost*, the court outlined six factors "among any others that may be relevant in the particular case" in determining whether an exhibition of the genitals or pubic area is "lascivious". *Id.* at 832. Those factors included such considerations as where and by whom the photograph was taken, the focal point of the image, and the demeanor of the subject. The fourth *Dost* factor, "whether the child is fully or partially clothed, or nude," according to the Third Circuit, "rests on the implicit assumption that a clothed exhibition of the genitals is criminalized under the statute." *Knox, supra*, 977 F.2d at 823. (PA 17).

The Third Circuit's conclusion is based on a number of errors. Depictions of clothed minors were never at issue in *Dost* and any discussion of the fourth *Dost* factor is, at best, dictum. Both minor subjects in *Dost* were "totally nude": the first was photographed "in a variety of positions . . . with her genitals and breasts fully exposed"; the second was photographed in a contorted pose so that "[h]er pubic area is completely exposed, not obscured by any shadow or body part." *United States v. Dost, supra*, 636 F. Supp. at 833. Furthermore, the *Dost* court's discussion of the fourth factor makes clear its belief that nudity of the genitals or pubic area is a prerequisite for the occurrence of an exhibition:

> For example, consider a photograph depicting a young girl reclining or sitting on a bed, *with a portion of her genitals exposed*. Whether this visual depiction contains a "lascivious exhibition of the

> genitals" will depend on other aspects of the photograph. If, for example, she is *dressed* in a sexually seductive manner, with her open legs in the foreground, the photograph would most likely constitute a lascivious exhibition of the genitals. . . . On the other hand, if the girl is *wearing clothing* appropriate for her age, the visual depiction may not constitute a "lascivious exhibition" of the genitals, *despite the fact that the genitals are visible.*

(Emphasis added). *United States v. Dost, supra,* 636 F. Supp. at 832.

Finally, the *Dost* court considered the fourth factor as relevant only to a determination of whether a given exhibition is "lascivious". The Third Circuit, on the other hand, used the fourth *Dost* factor to determine whether there is an exhibition. The two issues are markedly different:

> In formulating an instruction defining "sexually explicit conduct" under § 2256(2)(E), the Court, of course, must instruct the jury that it must find that the pictures visually depict the minor's genitals or pubic area. This is a threshold element contained in the [statute] itself, distinct from the additional requirement that the depiction be "lascivious".

United States v. Arvin, 900 F.2d 1385, 1391 (9th Cir. 1990).

Thus, the Third Circuit's reliance upon *Dost* to support its finding that nudity of the genitals or pubic area is not required by the federal statute is utterly misplaced.

One of the photographs at issue in *United States v. Villard,* 700 F. Supp. 803 (D. N.J. 1988), *aff'd,* 885 F.2d 117

(3d Cir. 1989), makes clear why a court might inquire whether the subject was "fully or partially clothed, or nude" in analyzing whether an "exhibition of the genitals or pubic area" is a "lascivious" one. That photograph depicted a fully clothed teenage boy, whose erect penis was sticking out one of the legs of his shorts. (See *United States v. Villard, supra,* 700 F. Supp. at 805.) The fact that the boy was fully clothed *and* his genitals were exhibited suggests that the court in *Knox* mistook "clothed" for "covered". That is, as the *Dost* court observed, a minor may be fully clothed at the same time his or her genitals are uncovered, i.e., exhibited. This is easily accomplished by pushing the clothing aside or causing the genitals or pubic area to appear through an opening in the clothing. It is these depictions to which the fourth *Dost* factor are relevant, not to depictions such as those in *Knox* where the subject's genitals are fully covered.

In its *Brief in Opposition to the Petition for a Writ of Certiorari,* the government urges the Court to adopt an interpretation of the federal statute which would permit Knox's conviction to stand on the theory that the depictions constitute "simulated" "sexually explicit conduct".[13] The government, however, is unable to point to

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[13] It should not be lost on the Court that this interpretation of the statute would constitute an entirely new theory on which to find the Petitioner guilty. The District Court's determination that the "uppermost portion of the inner thigh" was part of the "pubic area", the Third Circuit's finding that an "exhibition" could occur without the genitals or pubic area actually being exposed to view, and the Justice Department's new-found "simulated" "lascivious exhibition of the genitals" all should alert the Court to the inherent vagueness which lies in attempting to apply the federal statute to the depictions at issue in *Knox.*

any legislative history which would suggest how the term "simulated" could sensibly be applied to the term "lascivious exhibition of the genitals or pubic area of any person," where the genitals of the minor are fully covered. Rather, it is clear from the background of the statute – aimed as it is at the "hard core of child pornography" – that the concern Congress was attempting to address with the term "simulated" was the potential simulation of the types of conduct set forth in 18 U.S.C. §§ 2256(2)(A) through (D).

Nowhere in the legislative history or in any case has a "simulated" "lascivious exhibition of the genitals" been discussed or described, because there can be no such simulation without nudity. The very act – unlike sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse – requires that the genitals be shown. If a "simulated" "exhibition of the genitals" can violate the statute, then the statute would no longer be "directed at the hard core of child pornography" and the statute would be broadened beyond any possible Congressional intention. Constitutional concerns about notice, vagueness and overbreadth would be insurmountable. The Rule of Lenity prohibits such a creative and expansive judicial construction.

4. The Rule of Lenity Requires Reversal of Knox's Conviction

Nothing in the statute, the legislative history, or the case law suggests that "child pornography" as defined under § 2256(2)(E), encompasses depictions of fully clothed minors in which neither the genitals nor the

pubic areas are exposed to view. The Third Circuit's interpretation of this criminal statute is admittedly expansive:

> Although our interpretation of an exhibition is *expansive*, the limiting principle in the statute is the requirement of lasciviousness.

(Emphasis added). *United States v. Knox, supra*, 977 F.2d at 823. (PA 19).

Such an expansion of a criminal statute is impermissible and violates the Rule of Lenity, "a rule of statutory construction whose purpose is to help give authoritative meaning to the statutory language." *United States v. Thompson Center Arms Co.*, ___ U.S. ___, 112 S.Ct. 2102, 2110 fn. 10, 119 L.Ed.2d 308 (1992). The "venerable Rule of Lenity" is "rooted in 'the distinctive distaste against men languishing in prison unless the lawmaker has clearly said that they should.' " *United States v. Bass*, 404 U.S. 336, 347-348, 92 S.Ct. 515, 522-523, 30 L.Ed.2d 488 (1971), quoting H. Friendly, *Benchmarks*, 209 (1967). *See also, United States v. R.L.C.*, ___ U.S. ___, 112 S.Ct. 1329, 1338, 117 L.Ed.2d 559 (1992). The Rule of Lenity has two purposes, "the main function of which," as Justice Stevens recently observed,

> is to protect citizens from the unfair application of ambiguous punitive statutes. Obviously, citizens should not be subject to punishment without fair notice that their conduct is prohibited by law.

United States v. Thompson Center Arms Co., supra, 112 S.Ct. at 2114 (Stevens, J. dissenting).

The Rule of Lenity requires "fair warning", in language that the common world will understand, of what the law intends to do if a certain line is crossed. *Liparota v. United States*, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089, 85 L.Ed.2d 434 (1985). *See also, McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931).

If the Court finds that 18 U.S.C. § 2256(2)(E) includes within the meaning of "lascivious exhibition of the genitals or pubic area" a depiction in which the genitals are concealed, then Knox will have been denied the fair warning required by the Rule of Lenity. It would be unreasonable to assume that Knox could have foreseen the divergent expansive interpretations adopted first by the District Court and then the Third Circuit.[14] He had no reason – given the plain wording and the legislative and enforcement histories of the statute – to suspect that his conduct was criminal. See, for example, *Bouie v. City of Columbia*, 378 U.S. 347, 350-352 (1964); *Rabe v. Washington*, 405 U.S. 313 (1972).

The second purpose for the Rule of Lenity is to ensure that lawmakers have genuinely called for punishment to be meted out. "Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass, supra*, 404 U.S. at 348, 92 S.Ct. at 523; *Liparota v. United States, supra*, 471 U.S. at 427, 105 S.Ct. at 2089. The application of the Rule of Lenity to

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[14] Nor could Knox have foreseen the third and completely different expansive interpretation proposed by the government in its *Brief in Opposition to the Petition for Certiorari*, pp. 7-8.

the Third Circuit's interpretation of 18 U.S.C. § 2256(2)(E) is required by the government's concession that no federal prosecution has ever before claimed that genitals may be exhibited at the same time that they are completely covered. The lack of prosecution is certainly not explained by an absence of such depictions in our society or that the government alone was oblivious to them. It seems fundamentally unfair that an individual graduate student who possessed three tapes containing such depictions can be the first and only person ever prosecuted under this interpretation of the statute.

B. The government failed to prove Knox had the requisite *scienter* to violate the statute.

Even assuming *arguendo* that a "lascivious exhibition of the genitals or pubic area" may include exhibitions of minors whose genitals are completely covered, Knox lacked the requisite *scienter* to commit the crime of receiving and possessing "child pornography" because he could not have known that such depictions ran afoul of the statute. This is more than just an excuse that he was ignorant of the law. Given the history of law enforcement in this area and the ubiquity of images of minors whose genitals are completely covered, no person could have believed that such images fell within the definition of "child pornography".

Common understanding of what laws mean encompasses not only the language of the statute itself, but also "the gloss which life has written upon it". *Nashville C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1254 (1940). As Professor Bickel has noted, "[t]he

average nonreader of the statute books knows of the law what he knows of ethics and customs, and for the rest, what he knows of prosecutions." Bickel, 'The Supreme Court – Foreward,' 75 *Harvard L. Rev.* 40, 63 (1961).

The fact that every other prosecution under the statute has involved images of minors whose genitals or pubic areas were nude and exposed to view weighs heavily against the Third Circuit's finding that Knox possessed the requisite *scienter* to violate the statute. Knox's purported awareness that the videotapes contained "materials designed to sexually arouse a pedophile" (*United States v. Knox, supra,* 977 F.2d at 825 (PA 24)) is irrelevant to his guilt when no reasonable person could have believed that the depictions fell within the definition provided in 18 U.S.C. § 2256(2)(E). As the Third Circuit itself taught in *United States v. Villard, supra,* 885 F.2d at 125, "[w]hen a picture does not constitute child pornography . . . , it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it." *See also, Faloona v. Hustler Magazine, Inc.*, 607 F. Supp. 1341, 1344-45 (N.D. Texas 1985), affirmed *sub nom. Faloona by Frederickson v. Hustler Magazine, Inc.*, 799 F.2d 1000 (5th Cir. 1986) (since "the nude pictures [did] not show the plaintiffs engaging in any sexual conduct or performing any sexual activity," they were not "child pornography," notwithstanding their appearance in an "offensive" magazine like *Hustler*.) There is no question but that many legal materials – for instance, depictions of mere nudity, lascivious displays of breasts or buttocks, or "alluring" images such as those often found in fashion magazines and clothing catalogs – may be found to be arousing by individuals so inclined.

Under these circumstances, a reasonable mistake as to the legality of the materials must be a defense. In *United States v. United States District Court for Central Dist. of Cal.*, 858 F.2d 534 (9th Cir. 1988), the Ninth Circuit held that the First Amendment requires that a defendant charged with violating 18 U.S.C. § 2251(a) be entitled to an affirmative defense based on a reasonable mistake of age. In *United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992), the Ninth Circuit held 18 U.S.C. § 2252 unconstitutional because the statute failed to require proof of *scienter* that the materials distributed are child pornography. In *X-Citement Video*, the government argued that § 2252 required knowledge only of the "nature and character of the material":

> The government's position is a bit cagey; it suggests at times that the statute requires that the distributor know that the material is child pornography, but argues that it does not require that the distributor know the age of the performers. . . . What the government seems to be saying . . . , however, is that the statute does not even require that the defendant know that one or more performers was under the age of 18, so long as he knew the general nature of the materials he was distributing.

United States v. X-Citement Video, Inc., 982 F.2d at 1287.

The *X-Citement Video* court, which held § 2252 unconstitutional for failure to require knowledge that at least one of the persons depicted in the images in question was a minor, distinguished *United States District Court for the Central Dist. of Cal., supra*, because producers are in a far

different position from those who merely receive or transport visual images after they are fixed on film or videotape. Thus, while the Constitution merely requires the availability of an affirmative defense to producers charged under § 2251(a), the Ninth Circuit held that those charged under § 2252 cannot constitutionally be found guilty where they have not been charged with knowing that one of the persons depicted was under the age of 18.

In *United States v. Sherin*, 1987 WL 6146 (S.D.N.Y.), Judge Lowe, unlike the *X-Citement* court, judicially engrafted a *scienter* requirement onto 18 U.S.C. § 2252 to save it from unconstitutionality, but dismissed the indictment for failure to allege an essential element of the crime. These cases demonstrate that the Third Circuit's reliance on *Hamling v. United States*, 418 U.S. 87, 123, 94 S.Ct. 2887, 2910, 41 L.Ed.2d 590 (1974); *United States v. Brown*, 862 F.2d 1033 (3d Cir. 1988); and *United States v. Moncini*, 882 F.2d 401, 404 (9th Cir. 1989) is inappropriate to the facts in *Knox*.

Hamling, unlike Knox, was obviously aware that he was dealing with materials depicting "sexually explicit conduct" of the type that could be found to be obscene. Similarly, both Brown and Moncini knew they were dealing with "child pornography," that is, depictions of minors engaged in sexually explicit conduct. Brown merely believed that the illegal materials depicted adolescent children rather than pre-pubescent ones, while Moncini was not aware that mailing child pornography to the United States was illegal.

Knox, however, could rely on the Nather brochures, which not only stated that the videotapes were not child

pornography, but, more importantly, explained *why* they were not in a believable fashion. While the Nather brochure boasted that the viewer would be sexually aroused by the videotapes, the descriptions assured Knox and anyone else that the videotapes depicted no "sexually explicit conduct" as defined in 18 U.S.C. § 2256 because there was no "actual or simulated" sexual conduct (§§ 2256(2)(A), (B), (C), (D)) and no nudity of the genitals or pubic area (§ 2256(2)(E)). The brochures' claim that the depictions were legal was reasonable because it is corroborated by the plain language of the statute, the legislative history, and the pattern of enforcement. In both receiving and possessing the videotapes – unlike the defendants in *Moncini* or *Brown* – Knox had an objectively reasonable belief that the videotapes did not violate the law. Such a belief bars his conviction and must be permitted as a defense.

C. If there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by clothing, then 18 U.S.C. § 2256(2)(E) is unconstitutionally vague and overbroad.

A statute which fails to provide adequate notice as to what conduct is prohibited is vague and cannot survive constitutional scrutiny. *Rabe v. Washington, supra,* 405 U.S. at 315 ("To avoid the constitutional vice of vagueness, it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed.") Furthermore, if the Third Circuit's interpretation of the federal statute is allowed to stand and Congress is found to have intended to include within the definition of § 2256(2)(E) depictions

of minors whose genitals are fully covered, then the law, as drafted, is facially invalid for overbreadth, because the arguably impermissible applications of the statute are real and "substantial" and no longer "directed to the hard core of child pornography." *See New York v. Ferber, supra,* 458 U.S. at 773, 102 S.Ct. at 3363.

Depictions of minors in which their genitals and pubic areas are fully covered by clothing such as leotards, bathing suits, and underwear are undisputedly ubiquitous and can be found in newspapers, books, and magazines, clothing catalogs, family albums, on the walls of art museums, in movies and on television, at fashion shows, dance recitals, and gymnastics and swimming meets. It is hardly comforting that "the limiting principle in the statute is the requirement of lasciviousness," the meaning of which the Third Circuit has *admitted* is "far from crystal clear." *United States v. Knox, supra,* 977 F.2d 823 fn. 5. (PA 19).

If an "exhibition of the genitals or pubic area" can be satisfied by depictions of minors whose genitals are completely covered by an article of clothing, the chilling effect of the federal statute will be enormous. Anyone who has photographed a minor at a dance recital, swim or gymnastics meet, at the beach, or at home, will immediately understand the danger of photographing a minor in a pose which could ultimately be deemed to be lascivious under the law. Every image will have to be examined to insure that the clothing covering the genitals and pubic area does not accidently or purposefully end up as a "focal point" of the image (few images have one focal point), that the child doesn't look coy or appear to be striking an unnatural pose, or that the image doesn't contain any tell-tale signs of "lascivious" intent. The use

of telephoto or zoom lenses would become fraught with danger, since "zooming in" on subjects could result in an "unnatural focus" on the clothing covering the genitals or pubic area. The danger is present even in the privacy of one's own home, using digital enhancement techniques (now available on many home video systems), to enlarge areas of a videotaped image.

Family members and friends, professionals and documentarists will have to take care when photographing children playing dress-up where the clothing might be "inappropriate" and where the children might strike "alluring" poses in childish playfulness, even though their genitals are fully covered. Any photographs of a clothed child taken in the proximity of a bed – "a place associated with sexual activity"[15] – will be suspect.

Prosecuting authorities will receive unlimited power to "get" an unpopular person, a political opponent, or a personal enemy because of the newly-established ease of making this dramatic criminal charge.

Such overbreadth cannot constitutionally be tolerated. When the Supreme Court upheld as constitutional the New York child pornography statute in *New York v. Ferber, supra,* it did so because the New York statute listed the prohibited sexual acts "with sufficient precision."

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by

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[15] *United States v. Dost, supra* at 825.

> the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of "sexual conduct" proscribed must also be suitably limited and described.
>
> * * *
>
> [The New York statute's] prohibition incorporates a definition of sexual conduct that comports with the above-stated principles . . . . The term "lewd exhibition of the genitals" is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation.

New York v. Ferber, 458 U.S. at 764-5, 102 S.Ct. at 3358-9.

The Supreme Court did *not* envision that the statute could be applied to depictions of clothed genitals and, in fact, warned:

> Nor will we assume that the New York courts will widen the possibly invalid reach of the statute *by giving an expansive construction* to the proscription on "lewd exhibition[s] of the genitals."

(Emphasis added). *New York v. Ferber, supra*, 458 U.S. at 773, 102 S.Ct. at 3363.

In expansively defining an "exhibition" to proscribe depictions of minors whose genitals are completely covered, the Third Circuit has violated not only *Ferber*'s constitutionally necessary admonition, but also a time-honored rule of statutory construction:

> When a federal court is dealing with a federal statute challenged as overbroad, it should, of

> course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction. [citations omitted].

New York v. Ferber, 458 U.S. at 769, 102 S.Ct. at 3361.

Rather than construe the statute narrowly, the Third Circuit gave it precisely the expansive construction against which the Supreme Court warned in *Ferber*, thereby criminalizing a "broad range of innocent conduct". Where, as here, there is no plain intent on the part of Congress that the statute "be so all-encompassing," such an expansive interpretation must be rejected. *United States v. Yip*, 930 F.2d 142, 149 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 197, 116 L.Ed.2d 157. *See also, Liparota v. United States, supra*, 471 U.S. 419, 426, 105 S.Ct 2084, 2088, 85 L.Ed.2d 434 (1985).

That Congress did not intend the statute to be so "all-encompassing" is obvious. Congress refrained from criminalizing not only mere nudity, but also "lascivious" depictions of uncovered breasts or buttocks.[16] Moreover, Congress defined the term "lascivious exhibition of the genitals" in the context of the phrase "sexually explicit conduct," which is defined in 18 U.S.C. § 2256 also to

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[16] Compare, for example, Connecticut Penal Code § 53a-193, which prohibits depictions of the genitals, pubic area, or buttocks "with less than a fully opaque covering . . . or the depiction of the covered male genitals in a discernibly turgid state." *See also*, Hawaii Penal Code, § 8707-750; Kansas Criminal Code, Article 35, § 21-3516; Mass. Penal Code, § 31; North Carolina Criminal Law, Article 26, § 14-190.13; Utah Criminal Code, Chapter 5a, § 76-5a-2; and Virginia Criminal Code, Article 6, § 18.2-390.

include sexual intercourse, bestiality, masturbation, and sadistic and masochistic abuse.

Although certain courts and prosecutors might wish to criminalize all depictions of minors which are "designed to sexually arouse a pedophile", we must heed Justice Brandeis' warning that

> [s]tatutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive.

United States v. Weitzel, 246 U.S. 533, 543, 38 S.Ct. 381, 383, 62 L.Ed. 872, 875 (1918).

CONCLUSION

For all the reasons above, the conviction of Stephen A. Knox should be reversed, and a judgment of acquittal entered.

Respectfully submitted,

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No. 92-1183

In the Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN A. KNOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether videotapes that focus on the genitals and pubic areas of minor females may constitute "lascivious exhibition[s] of the genitals or pubic area" under 18 U.S.C. 2256(2)(E) even though those body parts are covered by clothing.

2. Whether the federal child pornography statute is unconstitutionally vague or overbroad if properly construed.

3. Whether petitioner had the requisite mental state to violate the federal child pornography statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 977 F.2d 815. The opinion of the district court denying petitioner's pretrial motion to dismiss the indictment is reported at 776 F. Supp. 174.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1992. The petition for a writ of certiorari was filed on January 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2252 (1988 & Supp. IV 1992) provides, in pertinent part:

(a) Any person who—

* * * * *

(2) knowingly receives * * * any visual depiction that has been mailed * * * in interstate or foreign commerce * * * if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

* * * * *

(4) either—

* * * * *

(B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed * * * in interstate or foreign commerce * * * if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

18 U.S.C. 2256 provides, in pertinent part:

For purposes of this chapter, the term—

* * * * *

(2) "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse * * *;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person.

STATEMENT

Following a bench trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of knowingly receiving through the mail visual depictions of minors engaged in sexually explicit conduct and knowingly possessing such visual depictions, in violation of 18 U.S.C. 2252(a)(2) and (4) (1988 & Supp. IV 1992). He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed. Pet. App. 1-25.

1. Petitioner, who had previously been convicted of receiving child pornography through the mail, became the subject of a Customs Service investigation when Customs agents intercepted two pieces of mail sent to him. The first, from the Netherlands, contained advertisements for child pornography. The second, from France, was sent to a false address that petitioner used. In that second piece of mail, a company returned a check from petitioner, and advised petitioner to determine whether the videos he had ordered "conform to the laws of your country." Aug. 28, 1991, Tr. 20-30; GX 2.

In April 1991, Customs agents searched petitioner's apartment pursuant to a warrant. At that time, the agents seized the three videotapes on which this prosecution is based. The three videotapes, each of which is between one and one-half and two hours long, were compilations petitioner had made from videos sold by the Nather Company of Las Vegas. Pet. App. 3. Petitioner had obtained about 15 videos sold by Nather (for approximately $60 each)—with titles such as *Ripe and Tender*, *Young Flashers*, and

Sweet Young Things—and had copied selected portions of those videos onto his own tapes. Nov. 14, 1991, Tr. 18, 24.

A catalogue of Nather Company videotapes "featuring teen and pre-teen girls" was also found in petitioner's apartment. It described *Young and Tight*, one of the videos from which petitioner made his tapes, as "featuring about 20 young beauties, ages 8-14, performing baton twirling, majorette and gymnastics routines, plus our usual panty-flashing shots and tight young butts in short-shorts and bikinis." With respect to *Lollipops*, which is also excerpted on one of petitioner's tapes, the catalogue states that there is "an enchanting scene showing a dark-haired beauty of 11 letting us have a long, slow look up her dress to view her snow-white panties." In addition, *Lollipops* features "scenes of a thirteen year old in a leopard skin bikini with a magnificent ass that she puts on display for you as she walks back and forth slowly and teasingly." According to the Nather catalogue, *Early Adolescence*, which petitioner copied onto one of his own tapes, was made in response "to the many requests we had been receiving for tapes that had almost exclusively candid panty shots." The catalogue advised that "if you like undies on girls between the ages of 8 and 16, we suggest you order this rare tape today." Nov. 14, 1991, Tr. 4-5; GX 1. Nather's promotional materials also asserted that its tapes were "completely legal" because there was "no sex or nudity." See 776 F. Supp. at 179.

The Nather tapes consist mainly of repetitious sequences set to background music. The district court described them as follows: "In each vignette the subject of the video would strike various poses which

were obviously being directed by someone off-camera. Whenever a particular pose revealed the girl[']s underpants or the area surrounding her genitals, the camera would zoom in on the area. In the course of each vignette, more than a substantial amount of time was spent focusing in on these areas, as well as the girl's buttocks." 776 F. Supp. at 179. Petitioner's videotapes consist of a series of excerpts from the Nather tapes. They contain numerous sequences during which all that is visible on the screen is the portion of a young girl from her navel to her thigh. The girls are typically wearing bathing suits or leotards, or spreading their legs so that their panties are visible under a short skirt.

2. In 18 U.S.C. 2252, Congress made it a crime to transport, receive, distribute, or possess any visual depictions that involve "the use of a minor engaging in sexually explicit conduct." It defined "sexually explicit conduct" in 18 U.S.C. 2256(2)(E) to include "lascivious exhibition of the genitals or pubic area of any person." Based on the videotapes seized from his apartment, petitioner was charged with receiving and possessing child pornography, in violation of Section 2252.

Petitioner moved to dismiss the indictment. He did not dispute that the videotapes were "lascivious," 776 F. Supp. at 180 n.7, but he contended that they contained no "exhibition of the genitals or pubic area." The district court acknowledged that while "[t]he Nather tapes were fraught with instances of the camera zooming in on the area of the girl's genitals, * * * in every instance the girl's genitals were covered." *Id.* at 180. The court observed, however, that "[s]exually explicit conduct covers exhibitions of the genitals *or* pubic area." *Ibid.* Concluding that "the pubic area would appear to be the region of the

human anatomy in close proximity to the genitals," the court denied the motion to dismiss, because "the area in close proximity to the genitals, specifically the uppermost portion of the inner thigh area closest to the girl's genitals, was clearly exposed" in most of the videotaped materials. *Ibid.*

A bench trial followed. The government argued, Gov't C.A. Br. 29-38, that petitioner's videotapes constituted "lascivious exhibition[s] of the genitals or pubic area" under the test formulated in *United States* v. *Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd *sub nom. United States* v. *Wiegand*, 812 F.2d 1239, 1244 (9th Cir.), cert. denied, 484 U.S. 856 (1987). Petitioner contended, on the other hand, that the videotapes did not exhibit the children's genitalia or pubic areas, because the subjects wore underpants, swimsuits, or leotards. Nov. 14, 1991, Tr. 19-20. At the end of the trial, the district court found petitioner guilty on both counts.

3. The court of appeals affirmed. Pet. App. 1-25.

a. The court framed the principal question as "whether videotapes that focus on the genitalia and pubic area of minor females constitute an 'exhibition of the genitals or pubic area' under the federal child pornography laws * * * even though these body parts are covered by clothing." Pet. App. 2. At the outset, the court determined that the district court had erred by concluding that the pubic area includes the upper portion of the inner thigh. The court explained that "[t]he most widely accepted human anatomy treatises make clear that the pubic area is entirely above the genitals and not below or alongside that portion of the anatomy." *Id.* at 8, citing H. Gray, *Gray's Anatomy* 90-91 (30th ed. 1985), and *Dor-*

land's Illustrated Medical Dictionary 1533 (27th ed. 1988).[1]

The court of appeals, however, rejected petitioner's contention "that the genitals or pubic area must be unclad or nude, and fully exposed to the camera, before an exhibition may occur." Pet. App. 10. The court relied on the fact that the dictionary definition of "exhibit" is "to present to view," "to show publicly," or to "put on display in order to attract notice." *Id.* at 11, quoting *Webster's Third New International Dictionary, Unabridged* 796 (1976). The visual depictions in petitioner's videotapes, the court found, clearly put the genitals and pubic areas of the young girls " 'on display' as the camera focused for prolonged time intervals on close-up views of these body parts. Pet. App. 11. Additionally, 'the obvious purpose and inevitable effect of the videotape was to 'attract notice' specifically to the genitalia and pubic area. Applying the plain meaning of the word 'exhibition' leads to the conclusion that nudity is not a prerequisite for the occurrence of an exhibition." *Ibid.*

The court of appeals found support in the legislative history for its interpretation. An early draft version of the statute prohibited only nude depictions of children. Pet. App. 11. Because Congress omitted any reference to nudity in the legislation that was enacted, the court of appeals considered the change to be an indication of Congress's intention to "criminalize both clothed and unclothed visual images of a child's genitalia if they were lewd." *Id.* at 12.

b. The court of appeals held that its construction did not render the statute unconstitutionally vague

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[1] We agree with the court of appeals' conclusion that the inner thigh is not part of the pubic area.

or overbroad. The court explained that "[a]lthough our interpretation of an exhibition is expansive, the limiting principle in the statute is the requirement of lasciviousness." Pet. App. 19.

c. Finally, the court of appeals rejected petitioner's contention that the evidence showed that he lacked the requisite mental state to violate the federal child pornography statute because he claimed to have believed Nather's assertion that its tapes were "completely legal." See 776 F. Supp. at 179. The court of appeals noted that it previously had held that "a defendant simply must be aware of the general nature and character of the material and need not know that the portrayals are illegal." Pet. App. 23. In this case, the court concluded, there was no doubt that petitioner was aware of the nature of the material Nather sold. Nather's promotional materials claimed that its films featured "girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy," and added that "it's almost like seeing them naked (some say even better)."

SUMMARY OF ARGUMENT

I. Although it properly rejected petitioner's contention that nudity is an absolute requirement for coverage under the federal child pornography statute, the court of appeals nevertheless utilized an impermissibly broad standard for determining whether a videotape can be considered to be a lascivious "exhibition" of the genitals or pubic area of a child. In an admittedly "expansive" construction, the court of appeals held that "clothed exhibitions of the genitalia are proscribed" when "a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image

sexually arousing to pedophiles." Pet. App. 19, 13, 15.

We submit that neither the statutory language nor the legislative history will bear such an interpretation. In our view, the plain meaning of the statute requires a prohibited depiction to contain two elements that the court of appeals did not consider: (a) the material must include a *visible* depiction of the genitals or pubic area of the body (as distinguished from a depiction of the clothing covering those areas); and (b) the material must depict a child lasciviously engaging in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer).

II. If the federal child pornography statute is properly construed, it is neither unconstitutionally overbroad nor unconstitutionally vague. This Court has upheld similar statutes against just such attacks on several prior occasions.

III. Petitioner's argument that the government failed to prove that he had the necessary mental state because he did not know that his videotapes were illegal was properly rejected by the court of appeals. Petitioner was completely aware of the nature of the contents of the materials and of the fact that they contain numerous depictions of under-age children. A mistake of law about the legality of those materials does not negate the mens rea necessary for a conviction.

IV. If the Court agrees with us that the court of appeals utilized an incorrect interpretation of the federal child pornography statute, we suggest that the proper course would be to vacate the judgment of conviction and remand for consideration under

the proper statutory standard. The relevant question on remand would be whether the evidence produced at trial was sufficient to support a general verdict of guilty under the correct legal standard.

ARGUMENT

I. THE VIDEOTAPES IN THIS CASE CONSTITUTE "LASCIVIOUS EXHIBITION[S] OF THE GENITALS OR PUBIC AREA" ONLY IF THOSE BODY PARTS ARE VISIBLE IN THE TAPES AND THE MINORS POSED OR ACTED LASCIVIOUSLY

1. The principal question in this case is whether petitioner's videotapes "exhibit" the genitals and pubic areas of young girls. We believe that, while the court of appeals was correct in holding that complete nudity is not absolutely required for a depiction to constitute a forbidden "exhibition," the court erred in holding that simply focusing on the midsection of a clothed body may constitute an "exhibition" of the unrevealed body parts beneath the garments. Rather, in our view, an "exhibition" requires both that the depiction in question focus on those body parts and that it render them visible in some fashion. While visibility does not necessarily require full visual exposure, it requires at least that the body parts themselves be discernible either through or beneath the clothing so that it can fairly be said that the depiction is an "exhibition" of the body parts rather than a depiction of clothed areas of the body.

As the opinion below points out, Pet. App. 11, the phrase "lascivious exhibition of the genitals or pubic area" entered the statute in this case as a replacement for an earlier draft provision that would have prohibited depictions of child "nudity, which

nudity is depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." S. 1011, 95th Cong., 2d Sess. (1977). Objection was made to this language on the ground that it was excessively vague. The phrase "lewd exhibition of the genitals or pubic area" was substituted at the suggestion of the Department of Justice.[2] That change was made in order more clearly to delineate "what *types of nude portrayals* of children were intended to be encompassed within this definition." *Protection of Children Against Sexual Exploitation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 77-78 (1977) (emphasis added).

Given this legislative history, we believe that the statute must be read to require at least some substantial degree of genital or pubic visibility in order for a depiction to constitute a "lascivious exhibition of the genitals or pubic area." This interpretation is strongly supported, we think, by Congress's choice of the term "exhibition" of the genitals or pubic area to describe the prohibited depictions. The most natural meaning of that term is that one of those parts of the body—rather than the clothing covering them —must be "on exhibit." As petitioner's amici state, Br. 10, "it would be a strange art 'exhibition' if all the pictures were hidden by cloth covers."

At the same time, some depictions make the genitals or pubic area visible even though, as a technical matter, those body parts are not nude. Acceptance

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[2] "Lascivious" was substituted for "lewd" by Congress in 1984 without any intent to change the meaning of the statute. See p. 15 note 6, *infra*.

of petitioner's argument that a videotape depiction cannot constitute a "lascivious exhibition of the genitals or pubic area" unless those areas are completely uncovered in all respects might therefore undermine the purposes of the statute in some cases. For example, a child dressed in a transparent or nearly transparent garment is not technically nude but a depiction of the child that focuses on the midsection would nevertheless "exhibit" the child's genitals and pubic area. In addition, displays of a child's pubic area under clothing that is so thin and tight as to reveal completely the contours of the genitals would not technically be nude displays, but could, we think, be considered to be "exhibitions" under the statute.[3] In our view, the Justice Department's reference to "nude portrayals" during the drafting of this statute does not preclude interpreting it in this limited fashion, although it rules out the court of appeals' more expansive construction.

2. There is a second reason why we believe the court of appeals did not employ the correct interpretation of the statute. Section 2252(a) covers depictions involving "the use of *a minor engaging in* sexually explicit conduct." Section 2256(2), in turn, defines the "sexually explicit conduct" of minors to which the statute applies as including "lascivious

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[3] We recognize that a requirement of visibility, even if the body parts are covered, is probably easier to apply in most cases with respect to boys than girls. Indeed, as petitioner's amici acknowledge, some state statutes explicitly prohibit depictions of the "covered male genitals in a discernibly turgid state." See Amicus Br. 18 n.10. But the genitals and pubic areas of girls may also be visible in some circumstances even if the girls are not completely nude.

exhibition[s]."[4] Depictions therefore come within the statute only if they show minors engaged in the conduct of lasciviously exhibiting their (or someone else's) genitals or pubic areas. See, *e.g.*, *New York* v. *Ferber*, 458 U.S. 747, 764 (1982): "[T]he nature of the harm to be combatted requires that the * * * offense be limited to works that visually depict *sexual conduct by children* below a specified age" (emphasis added). Perhaps because petitioner did not raise this issue clearly, neither the district court nor the court of appeals below addressed the question of whether the minors who appear in these videotapes can be said to have been acting or posing lasciviously, as the statute requires.

3. The court of appeals has thus applied an incorrect standard regarding whether the materials in this case come within the purview of the federal child pornography statute. We nevertheless believe that the materials in this case may in fact fall within the statute when judged according to the correct standard. In these circumstances, we think the appropriate course is for the Court to vacate the judgment below and remand the case for reconsideration under the statutory standard that we have described, *i.e.*, one requiring (a) genital or pubic area visibility, and (b) lascivious posing or acting on the part of the minors whose bodies are exhibited. See Part IV, *infra*.

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[4] There is no basis for arguing that any of the other statutorily defined categories of "sexually explicit conduct" ("sexual intercourse," "bestiality," "masturbation" or "sadistic or masochistic abuse") applies in this case.

II. CONSTRUING "LASCIVIOUS EXHIBITION OF THE GENITALS OR PUBIC AREA" NOT TO REQUIRE COMPLETE NUDITY DOES NOT RENDER THE STATUTE UNCONSTITUTIONALLY VAGUE OR OVERBROAD

Petitioner contends that, absent a strict nudity requirement, the federal child pornography statute is unconstitutionally vague and overbroad. Br. 35-40. This Court has, however, already concluded in *New York* v. *Ferber*, 458 U.S. 747 (1982), that a statute nearly identical to the federal child pornography statute is not impermissibly overbroad. Nor is the federal statute, properly construed, unconstitutionally vague.

1. The First Amendment overbreadth doctrine is one of the few exceptions to the traditional principle that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York* v. *Ferber*, 458 U.S. at 767. The Court has recognized that the overbreadth doctrine is "strong medicine" that should be employed "only as a last resort." *Id.* at 769, quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973).

In *Ferber*, the Court held that a New York child pornography statute that prohibited "lewd exhibition of the genitals," see 458 U.S. at 751, was not substantially overbroad. Noting that the court of appeals "was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute," the Court nevertheless concluded that because there was no showing that "these arguably

impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach," the statute did not suffer from substantial overbreadth. *Id.* at 773. To the extent there was any overbreadth at all, the Court reiterated its statement in *Broadrick* that the overbreadth problem could be cured by a case-by-case analysis of fact situations to which the statute could not be applied. *Id.* at 773-774, quoting *Broadrick* v. *Oklahoma*, 413 U.S. at 615-616.[5]

Thus, this Court has already rejected an overbreadth challenge to a state statute similar to the statute at issue here.[6] If the federal statute is construed as we have suggested in Part I of this brief, the same conclusion follows here. Properly construed, a "lascivious exhibition of the genitals or pubic

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[5] In *Osborne* v. *Ohio*, 495 U.S. 103 (1990), the Court rejected a similar overbreadth challenge to a state child pornography statute that prohibited the possession of nude photographs of minors. The Ohio Supreme Court had construed the statute to prohibit such photographs only where the nudity "constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged." See *id.* at 113. So construed, this Court held that the statute "plainly survives overbreadth scrutiny," observing that the limiting language prevented prosecution for possession of innocuous photographs of naked children, and that the language was similar to that upheld against an overbreadth challenge in *Ferber*. *Id.* at 113-114.

[6] "Lascivious" and "lewd" are synonymous. *United States* v. *Weigand*, 812 F.2d 1239, 1243 (9th Cir.), cert. denied, 484 U.S. 856 (1987). Congress replaced "lewd" with "lascivious" in 1984 because "lewd" had been associated with obscenity, and Congress wanted "to make it clear that an exhibition of a child's genitals does not have to meet the obscenity standard to be unlawful." 130 Cong. Rec. 7196 (1984) (Sen. Specter).

area" of children is not protected speech. *New York* v. *Ferber*, 458 U.S. at 747. Justice Brennan made exactly that point in dissent in *Massachusetts* v. *Oakes*, 491 U.S. 576 (1989), which involved a challenge to a child pornography statute that broadly proscribed child "nudity." He stated that there was a "simple corrective[]" to the overbreadth problem caused by the statute—it could have been amended to proscribe "lewd exhibition of the genitals." *Id.* at 598. That showed "the ease with which its unconstitutional applications might be eliminated." *Ibid.*

Even if it were to be assumed that the federal child pornography statute is capable of reaching some protected speech, the statute is nevertheless not unconstitutionally overbroad. If there are any "lascivious exhibition[s]" of children's genital and pubic areas that are protected expression, there certainly cannot be many. At the same time, the statute unquestionably reaches a broad range of *un*protected expression, including lascivious depictions of naked children. Any arguably impermissible applications of the statute amount to, at most, no more than "a tiny fraction of the materials within the statute's reach." *New York* v. *Ferber*, 458 U.S. at 773, and those cases can be dealt with if and when they arise. Thus, just as the Court held in *Ferber* with respect to the similar New York statute that was at issue there, this is "the paradigmatic case of a * * * statute whose legitimate reach dwarfs its arguably impermissible applications," *ibid.*, and the overbreadth challenge therefore fails.[7]

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[7] In *Ferber*, the Court added that it would not "assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the pro-

2. Nor does the construction we propose render the statute unconstitutionally vague. It will not, we submit, be difficult to determine whether pictures "exhibit" the genitals or public areas if that term is restricted to visible depictions of those areas. In addition, the Court has already held in both *Miller* v. *California*, 413 U.S. 15 (1973), and *Ferber* v. *New York*, *supra*, that a requirement of lewdness or lasciviousness as applied to exhibitions of the genital area does not introduce an element of unconstitutional vagueness.

III. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT PETITIONER HAD THE NECESSARY MENTAL STATE TO VIOLATE THE CHILD PORNOGRAPHY STATUTE

Petitioner also argues that the government failed to prove that he had the necessary mental state to violate the federal child pornography statute, because he allegedly did not know that his videotapes were illegal and he relied on Nather's claims that its products were legal. Br. 31-35. The court of appeals correctly found, however, that the evidence was suffi-

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scription on 'lewd exhibition[s] of the genitals.'" 458 U.S. at 773. With respect to a federal statute, the danger of overly expansive interpretation is more limited, since this Court has ultimate control of the construction of federal statutes. Unlike the interpretation adopted by the court of appeals below, the construction of the term "exhibition" that we propose—which requires that the genitals or pubic area be uncovered or, if covered, be sufficiently revealed by the covering to constitute a visible display—is not an expansive interpretation of the term. In addition, the reach of the federal statute is also substantially restrained by the requirement that the minor involved engage in "lascivious" conduct.

cient to show that petitioner had the requisite criminal intent.

This Court made clear in *New York* v. *Ferber* that child pornography laws, like obscenity laws, must include "some element of scienter on the part of the defendant." 458 U.S. at 765, citing *Smith* v. *California*, 361 U.S. 147 (1959), and *Hamling* v. *United States*, 418 U.S. 87 (1974). The federal child pornography statute requires proof that a defendant "knowingly" transported or shipped, or "knowingly" received or possessed, visual depictions of a minor engaging in "sexually explicit conduct." 18 U.S.C. 2252. The courts have held that the mens rea requirement in the statute is satisfied if a defendant is shown to know the nature and contents of the materials. See *United States* v. *Osborne*, 935 F.2d 32, 34 & n.2 (4th Cir. 1991); *Rodriguez* v. *Clark Color Laboratories*, 921 F.2d 347, 349 (1st Cir. 1990); *United States* v. *Duncan*, 896 F.2d 271, 277-278 (7th Cir. 1990); *United States* v. *Moncini*, 882 F.2d 401, 404 (9th Cir. 1989); *United States* v. *Brown*, 862 F.2d 1033, 1036-1038 (3d Cir. 1988); *United States* v. *Johnson*, 855 F.2d 299, 306 (6th Cir. 1988). There is no question that petitioner knew the nature and contents of the materials he ordered.[8]

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[8] The Ninth Circuit recently held 18 U.S.C. 2252 unconstitutional on its face because of that court's finding that the statute contains no requirement that the defendant have knowledge that the persons depicted in the materials are minors. *United States* v. *X-Citement Video*, 982 F.2d 1285 (1992). Petitioner, however, does not argue that he was unaware that the girls on his videos were minors. Indeed, any such claim would be implausible, in light of Nather's advertising—which, for example, advised that "if you like undies on girls between the ages of 8 and 16," order *Early Adolescence*, Nov. 14,

In essence, petitioner claims that he made a mistake of law, and that no reasonable person could have expected that depictions of the type he possessed would be held to fall within the definition of child pornography. But ignorance of the law or a mistake of law is ordinarily no defense to criminal prosecution. *Cheek* v. *United States*, 498 U.S. 192, 199 (1991). This Court has specifically applied that rule to the federal obscenity statutes, *Hamling* v. *United States*, 418 U.S. 87, 123 (1974), and the reasoning of that decision applies equally to the closely related context of child pornography. See Pet. App. 22-23; see also *United States* v. *Moncini*, 882 F.2d at 405-406. As this Court explained in *Hamling*, it is sufficient to show that the defendant had knowledge of the nature of the materials; he need not be shown to have known they were illegal.[9] In light of the explicit descriptions of the materials petitioner ordered, and the finding of the courts below that he was definitely aware of the nature of the materials, "he must bear the risk of the potential illegality of his conduct." *United States* v. *Moncini*, 882 F.2d at 405.

Petitioner also argues that he could rely on the representations of the Nather Company that the video-

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1991, Tr. 4-5; GX 1—and petitioner's own notes on the boxes for the videos—which, for example, noted that *Ripe and Tender* showed a "10 yr. old in sexy swimsuit poses," Aug. 28, 1991, Tr. 46; GX 3.

[9] Petitioner relies, Br. 33, on *United States* v. *United States District Court for Central Dist. of Cal.*, 858 F.2d 534 (9th Cir. 1988), in which the court of appeals held that a defendant charged under the federal child pornography statute was entitled to an affirmative defense based on a reasonable mistake of age. Such a claim, however, is not a mistake of law defense. Rather, it tends to negate a defendant's knowledge of the nature and content of the materials.

tapes they were advertising were legal. The court of appeals correctly answered that contention by observing that "relying on Nather's disclaimer is tantamount to asking a hard core pornographer for legal advice as to whether the material he earns a living by selling is legal. * * * If anything, the need to profess legality should have alerted [petitioner] to the films' dubious legality." Pet. App. 24.

IV. THIS CASE SHOULD BE REMANDED SO THAT THE COURT OF APPEALS CAN ASSESS THE SUFFICIENCY OF THE EVIDENCE UNDER THE PROPER LEGAL STANDARD

Although we believe that petitioner's videotapes may be deemed to be unlawful under what we view as the correct statutory standard, we recognize that the court of appeals did not employ that standard and that the court reviewed petitioner's conviction under a more expansive test. Nor did either of the parties below address the application of the correct standard to the facts of this case. For that reason, we believe that, if the Court agrees that an incorrect construction of the statutory phrase was used below, the appropriate disposition is to remand the case to the court of appeals for application either by that court or the district court of the correct standard to the facts of this case.

As we have noted above, the correct construction of the phrase "lascivious exhibition of the genitals or pubic area" by a minor poses two separate issues under the child pornography statute. The first is the question that was the principal focus of the litigation in the lower courts—whether the videotapes constituted a "visual depiction" of "sexually explicit conduct." See 18 U.S.C. 2252(a)(2)(B) (as to the re-

ceipt count), 2252(a)(4)(B)(ii) (as to the possession count). The second issue involves an element of the offense that was not featured in the lower court proceedings—whether the production of the videotapes involved the use of minors engaging in "sexually explicit conduct" through a "lascivious" exhibition of their genitals or pubic areas. 18 U.S.C. 2252(a)(2)(A) (as to the receipt count); 18 U.S.C. 2252(a)(B)(i) (as to the possession count). The court of appeals should be afforded the opportunity to determine whether the resolution of those issues, if appropriately preserved for review, would be affected by the legal standard for determining whether the conduct depicted in petitioner's videotapes constituted "lascivious exhibitions of the genitals or pubic area" by a minor within the meaning of the statute.[10]

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[10] The court of appeals held that petitioner waived his right to raise issues he presented in his post-trial motion for a judgment of acquittal, because that motion was untimely filed. See Pet. App. 7-8. Although the court of appeals further stated that petitioner's failure to file a timely motion for a judgment of acquittal barred him from challenging the sufficiency of the evidence except for plain error, *id.* at 20, we believe the court was mistaken in that regard. At the bench trial before the district court, petitioner argued in favor of a judgment of acquittal, raising the points he subsequently raised before the court of appeals. Because the trial court was sitting as the finder of fact, it was not necessary for petitioner to file a separate motion at that time under Rule 29, Fed. R. Crim. P., to preserve his right to challenge the sufficiency of the evidence on appeal. See *United States* v. *Rosas-Fuentes*, 970 F.2d 1379, 1381 (5th Cir. 1992); *United States* v. *Whitlock*, 663 F.2d 1094, 1097 n.24 (D.C. Cir. 1980); *United States* v. *Hon*, 306 F.2d 52, 54 (7th Cir. 1962); *Hall* v. *United States*, 286 F.2d 676, 677 (5th Cir. 1960), cert. denied, 366 U.S. 910 (1961). Thus, while petitioner's failure to file a timely post-verdict motion for a judgment of acquittal barred him from obtaining

There is another issue regarding the appropriate disposition of this case that warrants comment. As we have noted, the court of appeals affirmed petitioner's convictions on a ground different from the one articulated by the district court in its pretrial order on petitioner's motion to dismiss the indictment. The district court denied the motion to dismiss on the ground that the inner portion of the upper thigh is part of the "pubic area" and that petitioner's videotapes included a number of depictions of that area; the district court therefore did not find it necessary to determine whether the genitals or pubic area had to be uncovered in order to constitute "lascivious exhibitions" within the meaning of the statute. The court of appeals rejected that analysis, but held that the motion to dismiss was nonetheless properly denied, because the statute applies to covered as well as uncovered body parts.

Although the district court based its order on the motion to dismiss on an erroneous legal theory, the court did not indicate at trial that it was applying the same theory in finding petitioner guilty. In fact, the court rejected defense counsel's suggestion to that effect, explaining that it regarded the disposition of the motion to dismiss and the guilty verdict after trial as quite separate matters. See Feb. 13, 1992, Tr. 11-12.

Because petitioner did not ask the district court to find the facts specially, see Fed. R. Crim. P. 23(c), it cannot be assumed that the district court's legal

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review of the merits of that motion, it did not bar him from obtaining review of the denial of his request for an acquittal, made at trial after all of the evidence had been submitted. See Nov. 14, 1991, Tr. 14-20.

error in the order denying the motion to dismiss infected the general verdict of conviction. The court of appeals' task in reviewing that general verdict therefore was (and, on remand, will continue to be) simply to determine whether the evidence was sufficient, under the correct legal standard, to support a general verdict of guilty.[11]

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the court of appeals for further proceedings.

Respectfully submitted.

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SEPTEMBER 1993

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[11] See *United States* v. *Musser*, 873 F.2d 1513, 1519 (D.C. Cir. 1989); *United States* v. *Hernandez-Salazar*, 813 F.2d 1126, 1130 (11th Cir. 1987); *United States* v. *Gant*, 691 F.2d 1159, 1163 (5th Cir. 1982); *United States* v. *Ochoa*, 526 F.2d 278, 1282 n.6 (5th Cir. 1976); *McClain* v. *United States*, 417 F.2d 489, 492 (9th Cir. 1969); 8A James Wm. Moore, *Moore's Federal Practice* ¶ 23.05[2] (2d ed. 1992); see generally *Cesario* v. *United States*, 200 F.2d 232 (1st Cir. 1952) (a request for special findings is the proper procedure by which a defendant may preserve a question of law for purposes of appeal).

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In The

Supreme Court of the United States

October Term, 1993

STEPHEN A. KNOX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

The government has unveiled yet another theory by which it seeks to convince a tribunal that the conduct of Stephen Knox falls within the prohibitions of 18 U.S.C. § 2252(a)(2) and (a)(4)(B). Initially, the government persuaded the district court that an exhibition of the upper part of the inner thigh constituted an exhibition of the pubic area. Subsequently, the government convinced the Court of Appeals that genitalia, even though covered by clothing, could still be exhibited. In opposition to Knox's Petition for Certiorari, the government urged that genitalia which were covered by clothing could also constitute a "simulated exhibition".

The government, in its responding brief, has correctly conceded that the standard used by the Third Circuit was erroneous, and that the statute, by its terms, prohibits lascivious nudity. The government also has correctly conceded that the depictions can be a lascivious exhibition "only if they show minors engaged in the conduct of lasciviously exhibiting their . . . genitals." (GRb 13).[1] However, the government has also urged that the definition of "exhibition" was intended by the Congress to cover depictions where the contours of the genitals may be "visible in some fashion"[2] even if the genitals

---

[1] "GRb" refers to the Brief for the United States, the government's responding brief.

[2] The government uses as an example of covered genitals that may be visible, a child dressed in a transparent garment. Petitioner concedes that if the genitals are covered by transparent material, there can be an exhibition of the genitals. Just as Petitioner has argued that a work of art which is covered by

are covered by opaque material. (GRb 10). This contention has no support in the wording of the statute, its legislative history, or precedent.

The videotapes at issue, without question, do not violate the government's newly-formulated standards. The youngsters depicted in the videotapes are all female and all clothed. Their genitals and pubic areas are neither exhibited nor are they visible in some fashion. The young girls are all engaged in commonplace activities, not acting lasciviously. That government's new test, as it incorporates the "may be visible in some fashion" standard, should be rejected because it is still an expansive interpretation which does violence to the plain meaning of the statute, the statute's legislative history, and the Rule of Lenity.

ARGUMENT

I. The Government's Proposed Standard to Determine Whether There Has Been an "Exhibition" Must Be Rejected.

The district court found Stephen Knox guilty of receiving and possessing videotapes depicting minors engaged in a "lascivious exhibition of the genitals" because it erroneously found that the "uppermost portion of the inner thigh" was part of the "pubic area". The Third Circuit rejected this reasoning, erroneously finding that material at issue illegal under 18 U.S.C. § 2252 *et seq.* because it depicts "lascivious" exhibitions of the genitalia

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cloth is not exhibited, so is it obvious that a work of art covered by glass *is* exhibited.

"even though those parts of the body are completely covered" by an article of clothing. In the government's Brief in Opposition to Stephen Knox's Petition for a Writ of Certiorari, the government implied that the Nather tapes ran afoul of the law as either "exhibitions" of "covered" genitals, as found by the Third Circuit, or "simulated" exhibitions. (*See* pp. 7-8). Abandoning those claims, the government now argues for an entirely new standard: that is, an "exhibition of the genitals or pubic area" may occur where the clothing renders the genitals or pubic areas "visible in some fashion":

> While visibility does not necessarily require full visual exposure, it requires at least that the body parts themselves be discernible either through or beneath the clothing.

(GRb 10).

> [D]isplays of a child's pubic area under clothing that is so thin and tight as to reveal completely the contours of the genitals . . . could, we think, be considered to be "exhibitions" under the statute.

(GRb 12).

A. The Government's Most Recent Theory Still Runs Afoul of the Plain Meaning of the Statute, Overlooks the Entirety of the Legislative History, and Ignores the Manner in Which the Law Has Always Been Enforced.

Nowhere in any other case has it ever been suggested that an "exhibition" of the genitals or pubic areas could be satisfied simply by the visibility of the "contours" of

those parts of the body.[3] The simple fact is that even under the most recent standard proposed by the government, Petitioner Stephen Knox is still the only person throughout the entire fifteen-year history of the federal child pornography law to have been accused or convicted of a child pornography crime on the basis of depictions of minors whose genitals and pubic areas were fully covered by an opaque article of clothing.

The government's new theory is little better than the Third Circuit's formulation. As the government admits,

> The most natural meaning of [the] term ["exhibition of the genitals or pubic area"] is that one of those parts of the body – rather than the clothing covering them – must be "on exhibit".

(GRb 11).

Thus, if a depiction of the clothing covering the genitals cannot qualify as an "exhibition" under the statute, neither can it qualify merely because the "contours" of the genitals or pubic area might be "visible in some fashion" underneath. (*See* GRb 10). Obviously, an exhibition of clothing where the "contours" of the genitals might be, to some degree, seen, is still only an exhibition of clothing, not an exhibition of the genitals themselves. However, it is an "exhibition of the genitals or pubic area" which the

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[3] The citation of the Illinois case, *People v. Walcher*, 515 N.E.2d 319 (Ill. App. 4 Dist. 1987) in the *amicus* brief submitted by the National Law Center for Children and Families is completely inapposite since the child's genitals were fully visible, i.e. nude, in some of the depictions at issue and partially visible, i.e. nude, in others.

statute requires in order for a depiction to be found illegal.

The government cites no support in the legislative history for its most recent theory because there is none. Indeed, the government concedes in its Brief for the United States and agrees with Petitioner that the very purpose of the statutory language "lewd exhibition of the genitals" was

> more clearly to delineate what *types of nude portrayals* of children were intended to be encompassed within this definition.

(Emphasis in original). (GRb 11).

The entire legislative history of the statute makes inescapable the conclusion that the statute requires nudity of the genitals or pubic area before there can be an "exhibition".

The only reference to legislative history cited by the government in support of its novel interpretation is this conclusory argument:

> [T]he Justice Department's reference to 'nude portrayals' during the drafting of this statute *does not preclude* interpreting it in this limited fashion, although it rules out the *court of appeals'* more expansive construction.

(Emphasis added). (GRb 12).

Thus, although the government's new interpretation is not *as* expansive as the Third Circuit's, it is still an expansive interpretation contradicted by the plain meaning of the statute. The Rule of Lenity prohibits not only

the Third Circuit's interpretation, but also the government's newly-minted, almost-as-expansive interpretation.[4]

B. The Government's Most Recent Theory Underscores the Importance of Applying the Rule of Lenity to This Case.

Despite having viewed the Nather videotapes, the government cannot even attempt to argue that these videos violate its newly-urged "correct standard". (GRb 20). This is possibly due to the fact that the government is unsure whether the "contours" which are revealed are enough to run afoul of its own interpretation.

Instead, the government merely offers the *possibility* that the Nather tapes "*may* be deemed to be unlawful" (GRb 13), (emphasis added), under the new standard and confesses difficulty in applying it:

> We recognize that a requirement of visibility, even if the body parts are covered, is probably

---

[4] The government's argument that "displays of a child's pubic area under clothing that is so thin and tight as to reveal completely the contours of the genitals would not technically be nude displays, but could, we think, be considered to be 'exhibitions' under the statute" raises the very issues of vagueness and overbreadth discussed by Petitioner's media and publishing amici. Mainstream creators, publishers, producers, distributors and retailers will once again have to guess whether or not the definition applies to their voluminous and widely-distributed materials.

> easier to apply in most cases with respect to boys than girls.

(GRb 12, fn.3).

Nor does the government offer any guidance as to how its "correct standard" is to be applied. Are the contours of *any* part of the genitals or pubic area sufficient to satisfy the test, or must the contours of the genitals as a whole be shown? How defined must the "contours" be? At what point will the clothing covering the genitals be "so thin" or "so tight" as to reveal a sufficient amount of "contour" to run afoul of the law? A careful consideration of these issues and the myriad speculations in which one could engage clearly demonstrate the need to follow the precise definition of the statute: that the genitals themselves, not the clothing or the "contours" of the genitals beneath the clothing, need to be visible in order for an "exhibition" to occur.

Knox is currently under a five-year sentence of incarceration for conduct that has never before been prosecuted and which does not contravene the plain meaning of the statute. The government's shifting theories for prosecution highlight the need for the rigorous application of the Rule of Lenity. Additionally, the government's "creativity" underscores the soundness of Petitioner's argument that Stephen Knox had no notice that his conduct violated the statute and that he did not have the requisite criminal intent. The government's attempt to expand the application of 18 U.S.C. § 2256 beyond what the Congress intended and what the law enforcement community and the public have understood, is constitutionally intolerable. If the Rule of Lenity means anything

at all, then the conviction of Stephen Knox must be reversed without remand.[5]

II. The Position of the Government's Amici Arguing For Affirmance Emphasizes the Need to Follow the Plain Meaning of the Statute and the Dangers of Expansive Interpretation.

The National Law Center for Children and Families ("NLC"), begins its *amicus* brief by inquiring whether Nather's style of videography and advertising contains "lascivious" ideas and then concludes, incorrectly, that "lascivious" ideas mean "lascivious exhibitions of the genitals or pubic area":

> It is impossible to ignore the blatant sexual overtones and dangerous to assume that covered means non-lascivious.

(NLCb 12).[6]

---

[5] Petitioner obviously opposes a remand. However, should the Court order a remand, the case should be returned to the district court for a new trial. Certainly, Petitioner has never been afforded an opportunity for advocacy at the trial level under either the government's newly-proposed theory or the Third Circuit's theory. Because, in pre-trial motions, the district court found an exhibition of the naked "uppermost portion of the inner thigh" could violate the statute, the defendant at the district court attempted to meet only that theory of prosecution.

[6] "NLCb" refers to the Amicus brief of the National Law Center for Children and Families and others. The argument of Amicus, National Family Legal Foundation has already been sufficiently addressed by the Amicus brief of the American Booksellers Foundation and others at p. 22, and by Petitioner in its main brief at pp. 32-35.

> Any reasonable person viewing the tapes and reading the promotional material must conclude that the videotapes contain lascivious exhibitions.

(NLCb 13).

The NLC has, however, read the statute's requirement that an "exhibition" be "lascivious" in an impermissibly broad and expansive manner – in fact, more expansive than any court, including the Third Circuit.[7] A glaring example of this expansive reading of what is "lascivious" is the contention that places such as playgrounds, schools, and swimming pools actually enhance the "lascivious" appeal (and hence the "lascivious" nature) of depictions of children whose genitals and pubic areas are fully covered by clothing:

> Because lasciviousness should be examined in the context of pedophile voyeurs, this Court should view visual images of young girls in playgrounds, schools, and swimming pools as would a pedophile. Pedophiles associate these settings with children, whom, to pedophiles, are highly eroticized sexual objects. It therefore follows as a matter of course that viewing videocassettes of the genitalia of young girls in these

---

[7] Petitioner essentially agrees with the government in its Brief for the United States that "lascivious exhibition[s] of the genitals or pubic area" are ones which "show minors engaged in the conduct of lasciviously exhibiting their (or someone else's) genitals or pubic areas." (GRb 13). *Cf.* Brief of Petitioner, pp. 21-23, in which the application of the word "lascivious" to "exhibitions of the genitals or pubic area" is discussed at length.

> settings permits the pedophile to fantasize about sexual encounters with them.

(NLCb 18).

The NLC offers this bizarre explanation as fulfilling the second factor of a six-factor test enunciated by a district court in *United States v. Dost*, 636 F. Supp. 828 (S.D.Ca. 1986). (*See*, NLCb 17).[8] Apparently, the NLC believes that "playgrounds, schools, and swimming pools" are "sexually suggestive" or places "associated with sexual activity" simply because "pedophiles" are sexually attracted to minors. Under this formulation, any photograph taken at a swimming pool which shows a child in a bathing suit could be deemed a "lascivious exhibition of the genitals" because it would satisfy two prongs of the *Dost* test. According to the Amici, whether the depictions in question focus on the clothing covering the genitals is only one factor in determining whether they are "lascivious" and "no single [*Dost*] factor is dispositive". (NLCb 17).

The NLC's expansive interpretation would allow a finding that the Nather videotapes contained "lascivious exhibitions of the genitals" *regardless* of whether they focused on the clothing covering the genitals. This is because, the NLC explains, it is only "non-pedophiles" who consider

> close-up shots of the genitalia to be the critical issue, while the purchasers of the videotapes

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[8] Both Petitioner and Respondent now agree that the *Dost* factors do not constitute the correct test to determine whether a given exhibition is "lascivious".

> find *the entirety* of the tapes to be provocative and sexually stimulating.

(Emphasis in original). (NLCb 11).

Thus, any depiction which "pedophiles consider . . . to be lascivious" could be proscribed as child pornography, whether the minors were nude or clothed and whether or not there was a focus on the clothing covering the genitals and pubic area. The newly-created concept of "back-door child pornography", born in the NLC's brief, would unconstitutionally expand this criminal statute to include anything that "pedophiles" might find sexually stimulating. This obviously violates the statute's plain meaning, legislative history, and the enforcement history, which denote a common understanding. Moreover, judicial precedent has taught that "child pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocent photo. . . . When a picture does not constitute child pornography, even though it portrays nudity, it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it." *United States v. Villard*, 700 F. Supp. 803, 812 (D.N.J.), and the authority cited in Petitioner's Brief, at 32.

CONCLUSION

For all the reasons above and in Petitioner's initial brief, this conviction must be reversed without remand.

Respectfully submitted,

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STATEMENT

The American Booksellers Foundation for Free Expression, the Council for Periodical Distributors Associations, the National Association of Artists' Organizations, the Periodical and Book Association of America, Inc., Aperture Foundation, Inc., the Freedom to Read Foundation, the Magazine Publishers of America, the American Civil Liberties Union and the Law & Humanities Institute submit this joint brief urging reversal of the decision below. This brief is submitted upon the written consents of counsel to both petitioner and respondent, which are submitted herewith.

THE *AMICI*

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and to educate booksellers, other members of the book industry and the public about the dangers of censorship, and to promote and to protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Council for Periodical Distributors Associations is the national trade association for approximately 400 independent local wholesale distributors who distribute over ninety-five percent of all magazines, comic books, paperback books and newspapers in every state of the United States.

The National Association of Artists' Organizations ("Artists' Organizations") is a not-for-profit, membership service organization dedicated to serving and promoting non-profit organizations engaged in the presentation and support of new and contemporary work in the visual, performing, literary, media and interdisciplinary arts. Artists' Organizations' members constitute the primary presenters, supporters and makers of new and evolving art in America.

The Periodical and Book Association of America, Inc., is an association of magazine and paperback book publishers who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada, for ultimate sale to the public, principally at newsstands.

Aperture Foundation, Inc., a not-for-profit corporation, was founded over 40 years ago by Ansel Adams, Dorothea Lange, Minor White and others to foster the fine art of photography. Aperture is dedicated to the presentation of distinguished historical and contemporary photography and to the study of new photographic media, through publishing, exhibitions, research, education and preservation.

The Freedom to Read Foundation ("FTR") is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The Magazine Publishers of America ("MPA") is a trade association for the consumer magazine industry. MPA was organized in 1919 and has a membership of approximately 200 publishers, representing almost 800 general interest consumer magazines, ranging from journals of literature to special interest publications to multi-million circulation publications.

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization with nearly 300,000 members, dedicated to the protection and promotion of individual rights and liberties, primary among them the freedom of speech. Most of the ACLU's members are purchasers, readers and viewers of books, magazines and films. In 1991, the ACLU

established an Arts Censorship Project specifically to combat increasing threats of censorship in the United States, including often overzealous enforcement of laws relating to information or creative expression about human sexuality.

The Law & Humanities Institute ("LHI") is a world-wide, not-for-profit organization consisting of scholars, writers, lawyers, literary critics and other creative persons who seek to strengthen the relations between law and the humanities. LHI monitors and opposes developments in the law that threaten freedom of expression of creative artists, other humanists and their creative imagination.

INTEREST OF THE *AMICI*

The court below held that pictorial representations of minors whose sexual organs are fully clothed and concealed constitute "lascivious exhibition of the genitals or pubic area" and are thus prosecutable under 18 U.S.C. § 2256(2)(E) as sexual exploitation of children. Aperture Foundation and members of the *amici* other than the FTR, ACLU and LHI publish, produce, distribute and sell books, magazines, videos, works of art and printed materials of all types, including ones that are scholarly, literary, artistic, scientific and entertaining. The *amici*'s members do not own what are commonly referred to as adult retail stores; nor do they distribute the adult materials that are generally found in such stores. *Amici*'s members do, however, create, distribute and sell mainstream materials that may include photographs or depictions of clothed teenagers and younger children in poses that may, in light of the Third Circuit's expansive holding, be considered lascivious exhibitions. The ACLU's and LHI's members are readers, viewers and acquirers of such material. Libraries and librarians represented by FTR provide such materials to readers and viewers. Because *amici*'s members include artists, distributors, booksellers and librarians who create, possess, distribute, sell and loan popular and potentially provocative books, periodicals and art, and the persons who

purchase them, *amici* have a significant interest in the resolution of the issue before the Court.

Sexual exploitation of children is properly denounced. Thus, violations of 18 U.S.C. § 2252 carry with them enormous penalties, social stigma and censure. Congress drafted the statute narrowly for this reason. Until the Third Circuit's ruling, however, *amici*'s members, in their attempts to comply with that statute, could obtain guidance from the universal requirement of nudity or explicit sexual conduct in determining whether a "lascivious exhibition of the genitals or pubic area" had occurred. Interpreting 18 U.S.C. § 2256(2)(E) to include fully clothed depictions of the genitals or pubic area as lascivious exhibitions removes that clear standard and raises the specter that *amici*'s members could unwittingly suffer the punishment and censure associated with violation of the statute.

The Third Circuit's expansive reading of the statute places *amici*'s members in a precarious position. Prior to this case, the statute provided a bright line test. If the material did not include pictures of sexual conduct or of genital nudity, a publisher, distributor, retailer or librarian would not be required to guess whether the material could be deemed lascivious. Under the Third Circuit's sweeping and novel construction, even if the material does not include nudity or sexual conduct, a publisher, distributor, retailer or librarian must nevertheless consider whether photographs include persons under eighteen, and speculate whether such depictions could be deemed lascivious, by pondering the imprecise and subjective factors established by the Third Circuit.

The decision below potentially criminalizes innumerable images that Congress never intended to be criminalized. Commonplace and universally-accepted materials such as advertisements, music videos and photographs suddenly become suspect. Thus photographs or video displays of cheerleaders, or of minors in any attire at all, even if in personal or family

photographs or videos; dance programs on television or dancing in music videos; magazines, television shows or movies involving teenagers; clothing advertisements, particularly of minors in such attire as swimsuits, underwear, shorts, leotards or other athletic wear; or any other visual depiction of a minor, only begin the list of materials that could be the subject of criminal investigation and prosecution under the Third Circuit's unprecedented ruling. Mainstream producers, distributors, retailers and librarians would be saddled with the virtually impossible burden of reviewing each and every item in their inventory or on their shelves to eliminate any image that conceivably could be deemed lascivious. The chilling effect on First Amendment rights of such a law is obvious and vast. This Court should reject the Third Circuit's erroneous and impractical construction of the statute and instead affirm the longstanding requirement of "nudity plus," which alone is consistent with the statutory language, legislative history and the Court's precedents.

SUMMARY OF ARGUMENT

The issue before the Court is one of statutory construction: whether photographic images of clothed minors engaged in no sexual activity can be the basis of criminal convictions under 18 U.S.C. § 2252(a)(2) and (4).[1] Established principles of statutory construction, the legislative history of the statute, and the Court's precedents establish that clothed images do not constitute a "lascivious exhibition of the genitals or pubic area." Only if the

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[1] 18 U.S.C. § 2256(2) defines "sexually explicit conduct" for the purposes of 18 U.S.C. §§ 2251-2257 as

> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> (B) bestiality;
>
> (C) masturbation;
>
> (D) sadistic or masochistic abuse; or
>
> (E) lascivious exhibition of the genitals or pubic area of any person.

Court accepts the Third Circuit's expansive interpretation of the statute will issues of constitutional magnitude, namely First Amendment overbreadth and vagueness, arise.

The Third Circuit held that petitioner Stephen A. Knox violated 18 U.S.C. § 2252(a)(2) and (4) by possessing three videotapes, which purportedly contained lascivious exhibitions of the genitals or pubic area of minors, although it is undisputed that none of the tapes contained nudity and all minors depicted wore bathing suits, cheerleading outfits, leotards or skirts and underwear. The Third Circuit conceded that its holding applied an expansive definition of the statutory requirement of a "lascivious exhibition of the genitals or pubic area." Under the Court of Appeals' expansive holding, such an "exhibition of the genitals or pubic area" occurs even when the genitals or pubic area are fully clothed and those body parts cannot be seen by anyone.

Neither the statutory language nor the legislative history supports criminalizing material that contains no sexual activity and no depictions of the nude genitals or pubic area. The Third Circuit based its holding that Knox violated the statute upon the court's own "subjective inquiry into whether or not the material is intended to elicit a sexual response from the viewer" — a breathtakingly broad inquiry that goes far beyond the language of the statute, and impermissibly criminalizes speech protected by the First Amendment. PA 19.[2] Non-nude depictions are not an "exhibition" of the genitals or pubic area. Under the Congressional definition, they simply are not "sexually explicit conduct" within the meaning of the statute.

The Third Circuit's holding diverts the inquiry from the objective statutory requirement of an "exhibition of the genitals or pubic area," which requires nudity, to a subjective inquiry into

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[2] Reference to the Third Circuit's opinion shall cite to Petitioner's Appendix to Petition for Certiorari, taking the form "PA ___."

the marketing intent, or pandering motivation, of the speaker. Congress did not, however, purport to criminalize the marketing or communicative intent of the speaker. The statute does not — and constitutionally cannot — criminalize expression containing only lawful images of minors because the expression might encourage sexual thoughts. Further, the determination of the intent of the communicator or the recipient is inherently speculative. The only images of minors that are prohibited by the statute are those involving actual sexual conduct (not at issue here) or "lascivious exhibition of the genitals or pubic area" — which, at a minimum, requires a nude depiction.

Misreading and misunderstanding the legislative history, the Third Circuit erroneously held that the statute does not require nudity and therefore that depictions of fully-clothed genitals or the fully-clothed pubic area can be deemed lascivious. The criminalization of fully-clothed depictions also ignores the leading case on this subject, *New York v. Ferber*, 458 U.S. 747 (1982). Moreover, even if Congress had meant to include photographs of clothed children not involved in sexual conduct within the definition of child pornography, as the Third Circuit held, such a definition would be beyond the scope of material permitted by *Ferber* to be regulated or banned. The concept of lascivious exhibition of clothed genitals is unique to the decision below, and not within the compass of the *Ferber* doctrine.

Permitting punishment for non-nude depictions of minors raises serious practical and constitutional concerns, and the risk of ruinous prosecutions, for the mainstream *amici* before this Court. Eliminating nudity as a requirement for a finding of a "lascivious exhibition of the genitals or pubic area" would expand significantly the range of materials — books of fine photographs, medical texts, music videos, videos of aerobics, dance and sporting displays, catalogues and even family pictures — it would be criminal to produce, sell or possess if they could be deemed "lascivious." The subjective standard adopted by the court below would severely chill mainstream

businesspersons engaged in the creation, distribution and sale of visual images, who would have to apply an imprecise, subjective test to every item they produced or sold involving depictions of clothed minors. Moreover, the Third Circuit's standard fails to specify *who* must have intended the prohibited response: the producer? the distributor? the retailer? all three? By its focus on the intended sexual response of the viewer, the Third Circuit's opinion criminalizes material simply because it may be provocative to some.

ARGUMENT

I. BOTH THE STATUTORY LANGUAGE AND CONGRESS' CLEAR INTENT REQUIRE NUDITY. ACCORDINGLY, A DEPICTION OF THE FULLY COVERED GENITALS AND PUBIC AREA CANNOT CONSTITUTE A LASCIVIOUS EXHIBITION OF THE GENITALS OR PUBIC AREA UNDER 18 U.S.C. § 2256(2)(E).

A. The Plain Language of the Statute Excludes Liability For a "Lascivious Exhibition" When Clothing Conceals the Body Parts Named in the Statute.

Congress' unequivocal intent in enacting 18 U.S.C. § 2256(2)(E) was to prohibit only exhibitions that both (1) depicted genital or pubic nudity and (2) were lascivious. A review of the statutory language and the statute's legislative history reveals that Congress never intended to criminalize depictions in which the genitals or pubic area are completely clothed and thereby concealed from view.

The language of the statute and its "ordinary" meaning is the first line of inquiry in determining a statute's scope. *Moskal v. United States*, 498 U.S. 103, 108 (1990); *see United States v.*

R.L.C., 112 S. Ct. 1329, 1334 (1992); *Blum v. Stenson*, 465 U.S. 886, 896 (1984). Here, the statutory language itself evinces Congress' requirement that, to be considered child pornography, a lascivious exhibition must involve, at a minimum, a nude depiction of the genitals or pubic area.

The Court of Appeals erred when it stated that "the principal issue on appeal" is "the interpretation of an 'exhibition.'" PA 10. To the contrary, as discussed in detail below, there is no real question what "exhibition" means: as the Court of Appeals itself indicated, it means "display" or "show[ing] publicly." PA 11 (citations omitted). "Exhibition," "display" and "showing" all require "present[ation] to *view*," "presentation ... in open *view*," "caus[ing] or permit[ting] to be *seen*." *Webster's Ninth New Collegiate Dictionary* (1985) (definitions of "exhibition," "display" and "show") (emphasis added); *see Webster's II, New Riverside University Dictionary* 452 (1984) (defining "exhibit" as "[t]o show externally, ... [t]o present for public view"). It would be a strange art "exhibition" if all the pictures were hidden by cloth covers. There should be no question in this case, therefore, as in all cases involving a visual image, that *something* was "exhibited" — *i.e.*, made visible — in the videotapes. The dispositive inquiry should be first whether what was exhibited was the "genitals or pubic area," as the statute requires, and second whether such an exhibition was "lascivious."

For the reasons the Court of Appeals itself gave, "the legal definition" of "genitals" and "pubic area" presumptively should be consistent with their "standard medical definition." PA 8-9. Those terms unambiguously refer to specific "portion[s] of the anatomy," "body parts," PA 8-9. It cannot seriously be suggested that, in their "medically accepted meaning," PA 9, those terms

would describe the clothing — such as bathing suits or leotards — that *cover* those body parts.[3]

The Court of Appeals properly rejected the district court's own "novel" interpretation of the term "pubic area," properly referred to the rule of lenity, and properly indicated that the term should be confined to its "medically accepted meaning."[4] PA 9-10. However, the Court of Appeals then ignored its own advice and erred by concluding that "[t]he genitals and pubic area[s] of the young girls in the [videotapes] were certainly 'on display' as the camera focused for prolonged time intervals on close-up views of these body parts." PA 11. To the contrary, as the Court had earlier acknowledged, "the genitalia and pubic areas of the young girls [in the videotapes] were always *concealed* by an abbreviated article of clothing." PA 4 (emphasis added). It was the *clothing* covering the genitals and pubic area that was "shown externally," and thus only the *clothing* was "exhibited." That which is "always concealed" is, by definition, *not* "displayed."[5]

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[3] It hardly requires a dictionary to know that "genitals" are "the various external and internal organs concerned with reproduction." *Dorland's Illustrated Medical Dictionary* 686 (27th ed. 1988). As the Third Circuit correctly recognized, the "pubic area is entirely above the genitals and not below or alongside that portion of the anatomy." PA 8 (citations omitted). And "area" is "a general surface or functional region." *Dorland's*, *supra*, at 123. Plainly, in medical terminology, neither the "genitals" nor the "pubic area" encompasses the clothing that covers them.

[4] Indeed, the trial court understood that the object on "exhibition" must be revealed — and not concealed by clothing — when it strained to include the "uppermost portion of the inner thigh" as part of the "pubic area," in order to rationalize upholding the indictment. PA 5.

[5] The Court of Appeals' error was thus very similar to the error made by the district court. Just as the statute "does not prohibit depictions of body parts simply because they are located in close proximity to the genitals [or pubic area]," PA 9, it does not prohibit depictions of clothing

The Court of Appeals also erred when it stated that "the obvious purpose and inevitable effect of the videotape[s] was to 'attract notice' specifically to the genitalia and pubic area." PA 11. To the contrary, at most the videotapes' "purpose and effect" was to "attract notice" to the *concealed* genital areas, and thereby to encourage the viewer to *imagine* the body parts concealed. But to encourage the *imagination* of the genitals or pubic area is plainly *not* to *exhibit* them. When something is "exhibited," there is no need for imagination.[6]

In addition, the Third Circuit's concededly broad interpretation, *see* PA 19, makes no sense within the context of the statute as a whole. The statute lists "lascivious exhibition of the genitals or pubic area" as one of five examples of proscribed "sexually *explicit* conduct," along with actual or simulated sexual intercourse, bestiality, masturbation and sadistic or masochistic abuse. 18 U.S.C. § 2256(2)(A)-(E) (emphasis added). In order to rise to the level of "explicit" sexual conduct proscribed by Congress, a "lascivious exhibition of the genitals or pubic area" must, by its nature, be as explicit as the other defined, sexual acts. The "lascivious exhibition" category can properly be interpreted only in the context in which it was drafted: as one type of sexually "explicit" conduct. *See* 2A Norman Singer, *Sutherland on Statutory Construction* §§ 47.16, 47.17 (5th ed. 1992). Non-nude depictions alone are not "sexually explicit conduct" and fall outside the rubric of sexually-explicit materials prohibited by the statute.

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[6] The Court of Appeals recognized that the statute does not "criminalize all visual images of children which an individual may find sexually arousing." PA 9. The statute also cannot be read as criminalizing depictions that may cause the viewer to imagine that which the viewer does not see.

B. The Third Circuit's Focus on Promotion and Marketing Is Beyond the Scope of the Statute's Language.

The statutory requirement that nude genitals or pubic areas be exhibited would not be met even if, as the Court of Appeals concluded, the "films themselves and the promotional brochures . . . demonstrate that the video tapes clearly were designed to pander to pedophiles." PA 4; *see also* PA 5 (quoting from the catalogue advertising the material). The statute does not, and cannot constitutionally, criminalize words that encourage sexual thoughts about otherwise lawful images of minors.[7] Rather, it criminalizes the possession of visual depictions of minors engaged in specified sexually explicit conduct. *See* 18 U.S.C. § 2252(a)(2), § 2256(2)(E).

Pandering would not convert a depiction that does not exhibit the genitals or pubic area into one that does. The question whether those specific portions of a minor's anatomy have been exhibited can be answered only by reference to the image itself. "Pandering" thus is entirely irrelevant to this threshold inquiry under section 2256(2)(E).

The Court's holding in *Ginzburg v. United States*, 383 U.S. 463 (1966), is not to the contrary. In *Ginzburg*, a case dealing with obscenity, the Court held that evidence of pandering is relevant "in determining the ultimate question of obscenity" because the "deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient." *Id.* at 470. *See also Pinkus v. United States*, 436 U.S. 293, 303 (1978). Thus, in the obscenity context, "pandering" may be relevant to the question of appeal to prurient interest, or to the question of "serious value," *Splawn v. California*,

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[7] Such a statute would far exceed the bounds of *New York v. Ferber*, 458 U.S. 747 (1982), and surely would be unconstitutional.

431 U.S. 595 (1977) — two of the prongs of *Miller v. California*, 413 U.S. 15, 24 (1973). But under the obscenity test, as in section 2256(2)(E), the threshold inquiry is whether the work at issue depicts specifically defined "sexual conduct," *id.* at 24, including "lewd exhibition of genitals." *Id.* at 25. So far as *amici* are aware, no court has ever held that "pandering" has any probative value in determining whether a work depicts specifically defined sexual conduct. Similarly, in a child pornography prosecution, pandering cannot possibly bear on the threshold question — which is the only question at issue here — whether an "exhibition of the genitals or pubic area" occurs when the genitals or pubic area are concealed by clothing.

C. The Statute's Legislative History Makes Clear that Nudity Is a Minimum Requirement For a "Lascivious Exhibition of the Genitals or Pubic Area."

Congress' intent to criminalize depictions containing, at a minimum, nudity and lascivious behavior is confirmed by the statute's legislative history. See *R.L.C.*, 112 S. Ct. at 1334; *Moskal*, 498 U.S. at 110; *Blum*, 465 U.S. at 896; *see also Brock v. Pierce County*, 476 U.S. 253, 261-65 (1986) (evaluating Congress' intent when construing statute); *Grove City College v. Bell*, 465 U.S. 555, 569 (1984) (evaluating "powerful evidence of Congress' intent" when construing statute). In enacting the statute, Congress specifically addressed and rejected as overbroad standards virtually identical to the one adopted by the Third Circuit. Indeed, Congress made clear that nudity was not only a requirement, but also that nudity alone was insufficient. Something more, a "lascivious exhibition of the genitals and pubic area," was required.

The legislative history of 18 U.S.C. § 2256(2)(E) demonstrates that Congress never intended to include non-nude depictions within the scope of the statute, and never seriously contemplated adoption of such a sweeping prohibition. S. 1011

(the "Roth" bill), the original legislative proposal that led to enactment of 18 U.S.C. §§ 2251-2257, prohibited "[n]udity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction."[8] Congress specifically rejected that nudity standard because it was overly broad. The Senate report recommending passage of the revised bill, which deleted the nudity standard, warned that the deleted standard was "so broad that it could conceivably prohibit such innocent scenes as 'skinny dipping' or even nude snapshots of babies that were mailed to grandparents." *Id.* Congressman Edward I. Koch said he would not endorse the nudity standard because "[he was] *concerned about the breadth* of [that] term[ ]." Cong. Rec. E3419 (daily ed. June 1, 1977) (statement of Rep. Koch) (emphasis added). The Committee on the Judiciary, reporting on the bill, recommended that Congress reject the original bill based in part on the Justice Department's conclusion that "there was a very strong possibility that the courts would declare this section unconstitutional on its face." S. Rep. No. 95-438 at 49.

Debate focused instead on which subset of nude depictions fell within the statute's reach. For example, former Assistant Attorney General Patricia M. Wald, in a letter to the Chair of the Judiciary Committee, proposed that the language, subsequently adopted, requiring "lewd [now, lascivious] exhibitions of the genitals" be substituted for "nudity." S. Rep. No. 95-438 at 63 (letter from Assistant Attorney General Wald to Senator James O. Eastland). The new language was intended to "make clear in the legislative history of the bill what types of nude portrayals of children were intended to be encompassed within [the statutory] definition." *Id. The extensive debates throughout the statute's history do not include a single reference to criminalizing non-*

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[8] S. Rep. No. 95-438, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 48-49 [hereinafter S. Rep. No. 95-438 at __].

nude depictions.[9] The statute cannot properly be read to criminalize non-nude depictions when Congress never intended or considered such an application.

Even the prosecutors who testified before Congress as it considered amendments to the statute understood 18 U.S.C. § 2256(2)(E) to require nudity, plus lewdness or lasciviousness. Robert Pitler, Bureau Chief of New York's District Attorney's Appeals Bureau, testified that "'lewd exhibition of the genitals' ... means more than mere nudity and describes a patently offensive, lascivious, lustful or obscene display." *Hearings on S. 2856 Before the Subcomm. on Juvenile Justice of the Comm. on the Judiciary*, 97th Cong., 2d Sess. 111 (1982) (statement of Robert Pitler). He reiterated this point several times during his testimony, emphasizing that excluding "mere nudity" from the statute helped ensure its constitutional application:

> it is important to re-emphasize that neither the present federal statute nor the proposed amendments would encompass acts of *simple nudity*, although there is a prohibition of lewd [now lascivious] exhibition of the genitals. Under the federal statute, *nudity would be encompassed only when it is accompanied by simulated sexual conduct, that is, the explicit depiction of the enumerated acts*.

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[9] *See, e.g., Protection of Children Against Sexual Exploitation Act of 1977*, Legislative History, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40; *A Bill to Amend the Sexual Exploitation of Children Act of 1977: Hearings on S. 2856 Before the Subcomm. on Juvenile Justice of the Comm. of the Judiciary*, 97th Cong., 2d Sess. (1982); *Child Protection Act of 1984*, Legislative History, 98th Cong., 1st Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 492; *Child Sexual Abuse and Pornography Act of 1986*, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952.

> By not prohibiting *simple nudity*, the federal statute, like other state counterparts would allow producers ample room to express an idea, convey a message or tell a story about the sexual conduct of children.

Id. at 115-16 (emphasis added).

Thus, while Congress expressly rejected the overly-broad nudity proposals in favor of a narrower standard, at no time did it "repudiate[ ] its earlier intention to confine the statute's coverage to nude exhibitions," as the Third Circuit erroneously maintains. PA 12-13. The mistaken interpretation adopted by the Third Circuit results in the broad prohibition that Congress rejected, which would endanger the freedom of expression of creators, publishers, distributors and possessors of valuable mainstream works of art and literature.

If any uncertainty remained after analyzing the statutory language and legislative intent, the time-honored rule that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" also compels a narrow construction. *Liparota v. United States*, 471 U.S. 419, 427 (1985) (citations omitted); *accord United States v. R.L.C.*, 112 S. Ct. 1329, 1338 (1992); *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2110 n.10 (1992); *Crandon v. United States*, 494 U.S. 152, 158 (1990). Where criminal sanctions are involved, a fair warning must be given of what behavior the law will punish. *United States v. Bass*, 404 U.S. 336, 347-48 (1971). The severity of criminal penalties and the accompanying moral condemnation require "legislatures and not courts [to] . . . define criminal activity." *Id.* at 348. Consequently, here, absent any clear intention to criminalize non-nude depictions, the Court must reverse the Third Circuit's novel and concededly "expansive" statutory construction.

D. Congress' Intent Is Presumptively Consistent With the Child Pornography Laws of the Fifty States — Not One of Which Would Criminalize Mere "Exhibitions" In Which the Anatomical Parts Specified By Law Are Entirely Concealed By Clothing.

The Court of Appeals' extreme and novel construction of 18 U.S.C. § 2256(2)(E) would criminalize depictions that *no* state has criminalized. It appears that no state criminalizes an "exhibition" when the genitals or pubic area are fully covered by clothing.[10] Five states do not criminalize exhibition at all, but only the portrayal of specified types of sexual conduct or sexual activity other than mere "exhibition."[11] Eighteen states expressly make nudity an element where exhibition or display otherwise

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[10] Citations to the 50 state child pornography laws are set forth in Appendix A. Five state statutes expressly provide that — absent sexual contact — the law can be violated only by depictions of the genitals or pubic area "with less than a fully opaque covering" or "covered male genitals in a discernibly turgid state." *See* Appendix A, statutes of Connecticut, Massachusetts, Ohio, Oklahoma and Virginia. Application to depictions of "covered male genitals" in these statutes is thus limited to cases in which the genitals' sexually aroused appearance can be "discerned," *i.e.*, is exhibited, despite the covering. These statutes, therefore, sensibly adopt a bright line test that producers, distributors and purchasers of visual depictions can readily apply. Absent sexual contact, the depiction cannot be deemed criminal unless it includes nudity or covered male genitalia in a discernibly turgid state.

[11] *See* Appendix A, statutes of Hawaii, Maryland, Montana, North Carolina and Rhode Island.

suffices for conviction.[12] In seven of those states, consistent with the plain meaning of the terms, exhibition of the genitals or pubic area is actually characterized as "nudity," "erotic nudity" or "genital nudity."[13] Sixteen states and the District of Columbia do not criminalize exhibition of the "pubic area" at all,[14] and four other states expressly provide that, to be unlawful, the pubic area when "exhibited" must be "unclothed" or "nude."[15] Like the federal law, the statutes in each of those twenty states reach "lewd [*i.e.* lascivious] exhibition of the genitals," but no reported case known to *amici* construes those statutes as deeming genitals to be "exhibited" when they are concealed. The remaining ten states each have adopted language similar to that of the federal statute at issue in this case.[16] Again, so far as *amici* are aware, in *none* of these states has this language ever been interpreted to criminalize an "exhibition" in which clothing conceals the genitals or pubic area. Although to *amici*'s knowledge no state court has ever expressly decided the question — presumably because no state prosecutor has ever had the audacity to advance the extreme construction adopted below — courts in two such states have

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[12] *See* Appendix A, statutes of Alabama, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Michigan, Mississippi, Missouri, Nebraska, New Jersey, Ohio, Oklahoma, South Dakota, Utah and Virginia.

[13] *See* Appendix A, statutes of Alabama, Colorado, Idaho, Michigan, Nebraska, Ohio and Oklahoma.

[14] *See* Appendix A, statutes of Alaska, District of Columbia, Florida, Indiana, Louisiana, Minnesota, Nevada, New Hampshire, New York, North Dakota, Oklahoma, Oregon, South Carolina, Texas, Vermont and Wyoming.

[15] *See* Appendix A, statutes of Kentucky, Massachusetts, Pennsylvania and Washington.

[16] *See* Appendix A, statutes of Arizona, Arkansas, California, Georgia, Kansas, Maine, New Mexico, Tennessee, West Virginia and Wisconsin.

suggested that actual exposure of the body parts is an essential element of their exhibition.[17]

The federal government's interest in protecting children from sexual exploitation is not stronger — or different in any pertinent respect — than that of the states. The fact that no state has criminalized the type of depictions at issue here is a strong reason to reject the Third Circuit's strained view that Congress considered the genitals or pubic area to be exhibited when concealed from view. Given this state law background, Congress surely would have been more explicit if it had intended to stake out new ground and to criminalize depictions that were lawful under the laws of every state. But there is not even a hint in the statutory text or legislative history that Congress had any such intent.

Accordingly, the judicial branch should not construe the statute in a way that is inconsistent with the plain and dictionary meanings of the statutory terms, and inconsistent with the common understanding of those terms reflected in state laws throughout the country.

II. WERE THE COURT TO ADOPT THE "EXPANSIVE" READING OF THE THIRD CIRCUIT, THAT CONSTRUCTION WOULD CREATE PROBLEMS OF CONSTITUTIONAL DIMENSIONS.

A. Criminalizing Non-nude Depictions Unconstitutionally Expands the Definition of Child Pornography Beyond That Authorized by *Ferber*.

The Court has permitted criminalization of non-obscene depictions of children only within narrow, judicially-established

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[17] *People v. Wallace*, 14 Cal. Rptr. 2d 67, 76 (Ct. App. 1992); *State v. Petrone*, 468 N.W.2d 676, 687 (Wis. 1991).

parameters. *See New York v. Ferber*, 458 U.S. 747, 764-767 (1982). To pass constitutional muster, legislation proscribing non-obscene sexually explicit depictions of children must (1) expressly define the conduct to be prohibited by applicable law as written or authoritatively construed, (2) "be limited to works that *visually* depict sexual conduct by children below a specified age," (3) suitably limit and describe the sexual conduct proscribed and (4) impose an "element of scienter on the part of the defendant."[18] *Id.* at 764-65. Accordingly, "depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retain[ ] First Amendment protection." *Id.*

Specific and objective standards are required so that citizens, including creators, producers, distributors and consumers of mainstream visual materials, such as *amici*'s members and *amici*, can objectively determine whether visual images that they produce, distribute, receive or possess could be deemed unlawful under the statute. The standard applied by the Third Circuit, by contrast, requires a subjective exploration of someone's intent, and of the subjective effect on the observer. PA 19. That inquiry patently falls short of *Ferber's* requirements of specificity and objective inquiry, and imposes a constitutionally impermissible burden on *amici* and their members.

The Third Circuit's analysis violates *Ferber*'s restrictions in two distinct ways. First, by eliminating the requirement of nudity and re-defining the term "lascivious exhibition of the genitals or pubic area," the court blurred the definition of statutorily-defined conduct and expanded the prohibited category beyond depictions of "sexually explicit conduct." To criminalize the depictions at issue in this case would effectively nullify the *Ferber* requirement that categories of sexual conduct be suitably limited and described.

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[18] The Court also requires laws regulating obscenity to specifically define and describe the sexual conduct that is prohibited. *Miller v. California*, 413 U.S. 15, 24 (1973).

Second, by focusing on lasciviousness as the "limiting principle" in the phrase "lascivious exhibition of the genitals or pubic area" the Third Circuit transformed "lasciviousness" to a "subjective inquiry into whether or not the material is intended to elicit a sexual response from the viewer." PA 19. If lasciviousness, which the Third Circuit read as being the sole limiting principle, can only be determined by an inquiry into the motive or intentions behind, and the projected reaction to, a particular work, there is no objective structure available to a person reviewing depictions of minors to determine whether those depictions could be deemed to violate the statute. Moreover, the Third Circuit even failed to specify whether it is the intent of the creator, the producer or the distributor, or of all three, that is relevant. The subjective standard adopted below, when coupled with the Third Circuit's deletion of the nudity element, leaves producers and distributors of provocative visual materials bereft of any objective guidelines to protect themselves, and imposes on mainstream businesses the virtually insurmountable burden of scrutinizing the communicative intent and potential impact on unknown viewers of innumerable items in their inventory.

As long as there is an objective requirement — *i.e.*, the requirement that nudity be present — it is of less concern to *amici*'s members that "lascivious" may be a blurry, subjective concept. However, adoption of a totally subjective test would have a serious impact on the publishing, producing and library communities. Publishers, producers, retailers and librarians, faced with the prospect of child pornography prosecutions based on images of clothed minors limited only by a subjective test of lasciviousness, would have only one rational response: self-censorship. The safety net of an objective bright line test would disappear.[19]

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[19] Similar issues arise under the *Miller* test for obscenity. Businesspersons and librarians can accommodate the parochial nature of the fluid community standards for prurient appeal and patent offensiveness, because they can rely on the safety net of an objective standard for works having serious value. *Cf. Pope v. Illinois*, 481 U.S. 497 (1987).

Were the Court to permit the subjective inquiry advocated by the Third Circuit, it would permit censure based on a work's potential impact on a particular, and even a particularly susceptible, viewer.[20] If the requirement of nudity is removed and is replaced solely with an inquiry into subjective intent and impact, a wide range of materials — books of fine photographs, medical texts, music videos, videos of aerobics, dance and sporting displays, clothing catalogues and even family pictures — could fall within the class of child sexual exploitation and thus become criminal. The producers and distributors of those works would be rendered unable to judge whether they are in compliance with the law. No justification compels the Court to make that radical departure from established standards.

To regulate the depictions at issue here would go far beyond any restrictions this Court has previously upheld. For example, *Ferber* involved explicit "sexual conduct," 458 U.S. at 765, and *Miller* involved both "sex and nudity." 413 U.S. at 25. Neither need be present under the Third Circuit's construction. Moreover, this Court expressly has recognized that "depictions of nudity, without more, constitute protected expression." *Osborne v. Ohio*, 495 U.S. 103, 112 (1990); *accord Ferber*, 458 U.S. at 765 n.18. Certainly, non-nude depictions such as those at issue here are protected expression.[21]

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[20] This is a step backward to the now discredited rule of *Regina v. Hicklin*, L.R. 3Q.B. 360 (1868).

[21] Several commentators, analyzing the state of the law following *Ferber*, have recognized both explicitly and implicitly that any visual representations subject to criminal prosecution as child pornography must at least contain nudity or sexual conduct. *See* Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 82 Sup. Ct. Rev. 285, 295 (1982) ("[m]ere nudity is undoubtedly insufficient"); Robert W. Ginn, *Child Pornography and the First Amendment: Abrogation of the Obscenity Doctrine in New York v. Ferber, 102 S. Ct. 3348 (1982)*, 16 Creighton L. Rev. 509, 523 (1983) (assuming requirement of nudity or sexual conduct by criticizing *Ferber* as banning materials "that may contain only isolated

footnote continued on page 24

B. As Interpreted By the Third Circuit, 18 U.S.C. § 2256 Is Vague, Overbroad and Could Criminalize Legitimate Materials Produced and Distributed By the *Amici*.

The Third Circuit's erroneous interpretation of 18 U.S.C. § 2256 raises overbreadth and vagueness problems of constitutional dimensions. By contrast, the narrower interpretation advanced here is rooted in established principles of statutory construction, the legislative history, and the Court's prior holdings, would avoid such constitutional concerns.

1. The Third Circuit's Decision Creates the Risk of Real and Substantial Overbreadth.

"The specific rationale of overbreadth scrutiny rests on a recognition that the actual application of overbroad laws is not their only vice. Rather, the doctrine emphasizes the need to eliminate an overbroad law's deterrent impact — or 'chilling effect' — on protected primary activity [*i.e.*, freedom of expression]." Note: *The Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 853 (1970).

The Court previously has recognized that a broad reading of the "lascivious exhibition" language could render the statute constitutionally overbroad. In *Ferber*, this Court suggested that "an expansive construction to the proscription on 'lewd exhibition[s] of the genitals,'" — statutory language virtually

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footnote continued from page 23

instances of child nudity or sexual activity"); Josephine R. Potuto, *Stanley + Ferber = The Constitutional Crime of At-Home Child Pornography Possession*, 76 Ky. L. J. 15, 76 (1987) (assuming nudity requirement in describing various activities potentially covered by *Ferber*).

identical to that at issue here — could "widen the possibly invalid reach of the statute." 458 U.S. at 773. By broadly construing "lascivious exhibitions" to encompass clothed depictions lacking any sexual conduct, the Third Circuit has done precisely what the Court warned against in *Ferber*.

The Third Circuit's expansive interpretation opens the door to unconstitutional prosecutions. *See Osborne v. Ohio*, 495 U.S. 103, 112-116 (1990). The Third Circuit's construction implicates federal regulation of countless examples of visual materials that creators, producers, distributors and purchasers would never expect to be criminally proscribed, which Congress did not intend to criminalize, and the regulation of which is constitutionally impermissible. Home videos, music videos (which often feature close-ups of portions of the bodies of gyrating dancers), art photographs, television (including teen-age dance shows and cheerleading contests, which again often feature close-ups), exercise videos (which oftentimes could be considered to focus on the clothed genital or pubic areas of the athletes), advertisements and films, including home videos, would be suspect.[22] Any depiction of minors in bathing suits, cheerleading outfits, leotards, skirts, or any attire at all, could fall within the statute's scope. Even advertisements for athletic wear or suntan lotion, which include young girls, could be criminalized under the Third Circuit's construction. Family photographs, videos or movies, for example, of children playing at the beach, could be in jeopardy because an enforcement officer, prosecutor or judge could deem them intended to elicit a sexual response. Artists could no longer safely use clothed minors as models, as many of the world's renowned artists have done. *See Massachusetts v. Oakes*, 491 U.S. 576, 593 (1989) (Brennan, J. dissenting).

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[22] The notion that home videos could be subject to prosecution is hardly far-fetched given Mr. Knox's prosecution based in part on a videotape he compiled from purchased videos. *See* PA 3.

Under the Third Circuit's interpretation, any of those works could be deemed criminal to possess or sell, even though they included neither sexual conduct nor any nudity whatsoever. Certainly, Congress did not intend these ordinary materials to fall within the rubric of proscribed materials. The breadth and scope of the Third Circuit's expansive, unconstitutional interpretation will undoubtedly have a chilling effect on *amici* and their members, and the statute should be construed to avoid such substantial overbreadth.

2. The Third Circuit's Erroneous Interpretation Is Also Impermissibly Vague.

The vagueness inherent in the Third Circuit's interpretation poses insurmountable problems for media *amici*'s members and other creators, producers and distributors of mainstream visual materials. When First Amendment rights are at issue, the Court has refused to tolerate the type of vagueness and overbreadth problems presented by the Third Circuit's interpretation here:

> The objectionable quality of vagueness and overbreadth . . . [depends] upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

N.A.A.C.P. v. Button, 371 U.S. 415, 432-33 (1963). Here, by requiring a subjective inquiry into whether materials possibly could be deemed "intended to elicit a sexual response from the

viewer" as the sole "limiting principle" of the statute's scope (PA 19), the Third Circuit invokes a standard that eludes definitive interpretation and that necessarily will be subject to disparate, variable and selective interpretation.

Such ambiguity must be, and can be, avoided by the straightforward application of rules of statutory construction which yield the generally acknowledged requirement of nudity, plus something more — lasciviousness. "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. . . . [W]e think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications." *Winters v. New York*, 333 U.S. 507, 515, 519 (1948).

A retailer or wholesaler should not and cannot have its criminal liability depend on the intent of a photographer unknown to it. Nor should a legitimate photographer have his artistic work turned into criminalized "child pornography" based on the subjective marketing intent of wholesalers or retailers. Indeed, the Third Circuit failed even to specify *whose* intent must be scrutinized: it left unclear whether the intent of the creator, the producer, the distributor, the retailer, or all of those individuals is relevant to prove a statutory violation.[23]

The Third Circuit's reading of the statute is vague, impossible to apply, and fails to draw the line between the allowable and forbidden with the requisite precision. A standard adopting the subjective inquiry fashioned by the Third Circuit leaves

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[23] At one point in its opinion, the Third Circuit singles out the intent of the photographer (PA 15); subsequently the court talks in broader terms (PA 19).

wholesalers, distributors, bookstores, libraries and video stores with the impossible burden of guessing the conceivable intent behind the creation or distribution of a visual image and its projected effect on a recipient. Compliance attempts would be burdened by the looming specter of a criminal child pornography indictment. The only sure course available to mainstream producers, distributors and sellers of visual materials is an impossible one: to scrutinize each and every depiction of a clothed minor in their inventory to insure that no materials possibly created or produced with the improper intent could be distributed. Given the breadth of the inquiry, and the range of everyday mainstream materials potentially covered, those businesspersons would be left with no choice but self-censorship.

The Court need not adopt a broad construction that would raise these constitutional concerns when an alternative construction is available, particularly where, as here, that narrower construction is supported by the statutory language, the statute's legislative history and the Court's prior holdings.

CONCLUSION

For the reasons set forth above, *amici* respectfully urge that the Court adhere to the plain meaning of the statute and its legislative history and reverse the judgment of the Third Circuit, or alternatively strike down the statute, as construed by the Third Circuit, for being unconstitutionally vague and overbroad.

August 3, 1993

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Appendix A

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Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN LIBARARY ASSOCIATION, ET AL.,	:	
PLAINTIFFS,	:	
- V -	:	CIVIL ACTION 89-661
DICK THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,	:	9:00 A.M., APRIL 25, 1989
DEFENDANTS.	:	WASHINGTON, D. C.

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE GEORGE B. REVERCOMB
UNITED STATES DISTRICT JUDGE

APPEARANCES:
ON BEHALF OF THE PLAINTIFFS

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ON BEHALF OF THE DEFENDANTS

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(THIS TRANSCRIPT WAS PRODUCED FROM ORIGINAL STENOTYPE NOTES.)
(COMPUTER AIDED TRANSCRIPTION)

SHIRLEY THERESA POPEJOY
OFFICIAL COURT REPORTER
6812 U.S. COURTHOUSE
WASHINGTON, D. C. 20001

PROTECT THOSE WHO APPEAR, BUT ALSO TO PROTECT THOSE AGAINST WHOM THIS TYPE OF MATERIAL IS USED.

THESE RECORD-KEEPING PROVISIONS DON'T NECESSARILY INTERFERE WITH FIRST AMENDMENT RIGHTS. THEY DON'T APPLY TO ARTISTIC PHOTOS. THEY DON'T APPLY TO MEDICAL TEXTS; THEY DON'T APPLY TO NEWS PHOTOS; THEY DON'T APPLY TO PROMOTIONAL MATERIALS OF THE AMERICAN SUNBATHING ASSOCIATION.

THE COURT: WHAT DO YOU MEAN THEY DON'T APPLY TO ARTISTIC?

MR. STEARNS: ARTISTIC PHOTOGRAPHS. COLLECTIONS OF ARTISTIC PHOTOGRAPHS, IF THEY ARE NOT A LASCIVIOUS EXHIBITION OF THE GENITALS OR PUBIC AREA, IT DOES NOT APPLY. AS I MENTIONED EARLIER, IT DOES NOT APPLY TO FULL FRONTAL NUDITY. IT APPLIES TO A VERY NARROW CATEGORY OF LASCIVIOUS EXHIBITION OF THE GENITALS OR PUBIC AREA. IT APPLIES ONLY TO ACTUAL SEXUAL CONDUCT NOT SIMULATED SEXUAL CONDUCT. PLAINTIFFS USE THE EXAMPLE IN THEIR REPLY BRIEF OF A DISTRIBUTOR'S VIEWING A FILM OF TWO PERSONS CAVORTING UNDER THE SHEETS AND UNABLE TO DETERMINE WHETHER THEIR ACTS ARE ACTUAL OR SIMULATED. WELL, IF YOU CAN'T TELL, THEY ARE CLEARLY NOT ACTUAL. IT IS AN EXAGGERATION AND I THINK A GROSS EXAGGERATION TO SUGGEST THAT THE DISTRIBUTORS WILL BE PUT IN AN IMPOSSIBLE POSITION; THAT HIS SPEECH WILL BE CHILLED BECAUSE IS HE IS UNABLE TO DETERMINE WHAT IS ACTUAL AND WHAT IS SIMULATED. THOSE ARE NOT VAGUE TERMS.

FILED
SEP 3 1993
OFFICE OF THE CLERK

No. 92-1183

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

STEPHEN A. KNOX,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL FAMILY LEGAL FOUNDATION IN SUPPORT OF THE UNITED STATES

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CONSENT OF THE PARTIES

Attorneys for Petitioner and Respondent have consented to the filing of an amicus curiae brief by National Family Legal Foundation. (Appendix A).

INTEREST OF AMICUS CURIAE

National Family Legal Foundation ("NFLF") is a non-profit legal organization founded in 1990. The Foundation exists to assist public officials in the enforcement and drafting of constitutional obscenity and child pornography laws. It also provides legal assistance to victims of pornography, especially child victims. NFLF provides public information on legal and social issues related to pornography, and on sexual exploitation and victimization by child pornographers. The Foundation has a legal staff of attorneys practicing exclusively in the First

Amendment/pornography area.

NFLF's former Executive Director, Alan E. Sears, was also the Executive Director of the Attorney General's Commission on Pornography. The Commission, after more than two years of examining the issue from legal, moral, clinical, social scientific, and other relevant perspectives, concluded that possession of child pornography is so intimately connected to the acts of child molestation depicted that a prohibition on possession of such material was required and that such laws needed to be zealously enforced, in a constitutional manner, for the protection of children.

NFLF seeks to file an amicus curiae brief in support of the United States in this case. NFLF is profoundly concerned with the victimization and exploitation of children by child pornographers. It believes the circuit court's decision is a reasonable and constitutional interpretation of the federal child exploitation statute.

SUMMARY OF ARGUMENT

The defendant was convicted of violating 18 U.S.C. § 2252(a)(2), which prohibits the sexual exploitation of children through the receipt of materials depicting minors engaging in sexually explicit conduct and by possessing three or more videotapes that contained visual depictions of a minor engaging in sexually explicit conduct. The court has granted certiorari to review whether there can be an "exhibition of genitals or pubic area" under § 2256(2)(E) under circumstances where the genitals and pubic area are scantily clad.

The sole purpose of the child exploitation statutes is to protect children. Because this governmental objective is of surpassing importance, pornographic materials that may not be obscene but which depict children fall outside the protection of the First Amendment.

In obscenity cases, evidence of pandering may be decisive to the issue of obscenity. This same concept -- pandering -- should be applied to child pornography cases. When applied to the facts of this case, it is clear that the defendant's conduct falls within the legitimate reach of the child exploitation statute and his conviction should be affirmed.

LAW AND ARGUMENT

KNOX'S CONDUCT BRINGS HIS ACTIVITY AND THE MATERIAL AT ISSUE WITHIN THE LEGITIMATE REACH OF 18 U.S.C. § 2252(A)(2)

Because of the very nature of child pornography and obscenity cases, the materials themselves are sometimes improperly placed "on trial". As a result, the focus is taken away from the defendant. But as Chief Justice Warren reminded us in *Roth v. United States*, 354 U.S. 476, 495 (1957): "It is not the book that is on trial; it is a person.

The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character." (Warren, C. J., concurring). In this case, the conduct of defendant Stephen Knox ("Knox") must be the central issue.

In obscenity cases, the defendant's conduct and pandering evidence allow the trier of fact to consider the role that exploitation and a defendant's motivation play in deciding the obscenity *vel non* of the material itself. Just as pruriency is a quality of the material itself, circumstances showing why and how an item was marketed or promoted bear on whether a defendant exploited its commercial sex value or whether he legitimately relied on its serious value for his economic success.

Similarly, evidence showing why and how Knox's materials were marketed or promoted bear on whether these

materials were possessed for their "innocent" qualities and serious art value, or for their exploitive nature. This evidence of the defendant's conduct and of pandering is also relevant to the determination of whether the materials constitute child pornography.

1. The Purpose of the Sexual Exploitation Statute is to Protect Children

Federal statutes prohibiting the sexual exploitation of children through the production of pornography -- as distinct from federal prohibitions on the distribution of obscene materials generally -- are of relatively recent origin. They reflect a concern that "[e]ach year tens of thousands of children under the age of 18 are believed to be filmed or photographed while engaging in sexually explicit acts for the producer's own pleasure or profit." H. Rep. No. 536, 98th Cong., 1st Sess., (Nov. 10, 1983), reprinted in 1984 U.S. Code Cong. & Admin. News, 492.

Congress recognized that the distribution and receipt of child pornography contributes to further incidents of child abuse:

> [M]any pedophiles -- those whose sexual preference is for children -- prefer to purchase [child pornography] through mail order catalogues. This is because often these catalogues permit the pedophile to order materials depicting specific sexual deviations, to establish contact with other pedophiles, and even to establish liaisons with some of the child models.

S. Rep. No. 438, 95th Cong., 2d Sess., at 5 (1977), reprinted in 1978 U.S. Code Cong. and Admin. News, 43.

This Court recognized the substantial governmental interest in protecting children from the evils of child pornography in *New York v. Ferber*, 458 U.S. 747 (1982). In an opinion by Justice White, the Court upheld a New York statute which prohibited the distribution of materials which depict children engaging in sexually explicit conduct whether or not such depictions are "obscene".

First, the Court found that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'" and the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 756–57, quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Further, the Court went on to say:

> The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.

Id. at 759 (footnote omitted). The Court concluded, because of the compelling state interests involved, that child pornography, even though not obscene, was not protected by the First Amendment.

Finally, in *Osborne v. Ohio*, 495 U.S. 103 (1990), this Court approved a law prohibiting the possession of child pornography, even in one's own home. In upholding the statute, this Court further addressed the impact of this vile crime:

> Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain....[E]ncouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

Id. at 110–11.

It must be remembered that in this case, whether genitals and pubic area are scantily clad or not, the children forced to pose for these provocative videotapes are victims who are exploited for the sexual gratification of adults. Knox is a pedophile, and the materials are obviously directed at pedophiles:

> The tapes contained numerous vignettes of teenage and preteen females, between the ages of ten and

> seventeen, striking provocative poses for the camera. The children were obviously being directed by someone off–camera. All of the children wore bikini bathing suits, leotards, underwear or other abbreviated attire while they were being filmed. The government conceded that no child in the films was nude, and that the genitalia and pubic areas of the young girls were always concealed by an abbreviated article of clothing. The photographer would zoom in on the children's pubic and genital area and display a close–up view for an extended period of time. Most of the videotapes were set to music. The films themselves and the promotional brochures distributed by Nather demonstrate that the video tapes clearly were designed to pander to pedophiles.

United States v. Knox, 977 F.2d 815 (3rd Cir. 1992). The same compelling state interests which were present -- and carried the day -- in *Ferber* and *Osborne*, and any child pornography case, are present in this case.

2. Evidence of Pandering May be Decisive in Determining Obscenity.

Pandering is "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." *Ginzburg v. United States*, 383 U.S. 463, 467 (1966), quoting *Roth v. United States*, 354

U.S. at 495–96 (Warren, C.J., concurring). In *Ginzburg*, the defendant was convicted of violating the federal obscenity statute as a result of mailing three different publications. Routinely, on questions of obscenity, the Court considers the materials as sufficient in themselves for that determination. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973). But in *Ginzburg*, the prosecution charged the offense of obscenity in the context of the circumstances of production, sale, and publicity and conceded that, standing alone, the publications themselves might not be obscene. *Ginzburg*, 383 U.S. at 465. The Court approved this approach.

> We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise... we view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal.

Id. at 465–66 (emphasis added).

The Court concluded:

> Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity.

Id. at 470. Thus, in *Ginzburg*, even though the three publications were not "hard core pornography", and presumed not obscene *per se*, they were deemed obscene because their prurient qualities were pandered or exploited by the defendant.

The development of this concept led the Court to hold in *Splawn v. California*, 431 U.S. 595, 598 (1977):

> There is no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene.

Further, despite the defendant's objection that the jury instruction allowed "the jury to consider motives of commercial exploitation on the part of persons in the chain

of distribution of the material other than himself", the Court found no constitutional problem. *Id.* at 599.

In *United States v. Dost*, 575 F.2d 1303 (10th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978), the circuit court held that evidence of pandering was admissible as relevant to whether the materials were obscene, even though the defendants were not charged with pandering and despite pandering not being an "element" of the crimes charged. As stated by the court, at 1305, the jury "could take into consideration the 'setting' in which the photographs and brochures were presented by the two defendants."

Finally, this Court upheld in *Hamling v. United States*, 418 U.S. 87 (1974), an instruction that the jury could consider evidence of pandering in applying the three-part obscenity test. The instruction approved by the Court stated, in part:

> In summary, evidence of pandering simply is useful in applying the basic obscenity test where an exploitation of interest in titillation by pornography

> is shown with respect to the material lending itself to such exploitation through pervasive treatment or description of sexual matters. Such evidence may support the determination that the material is obscene, even though, in another context, the material would escape such condemnation.

United States v. Hamling, 481 F.2d 307, 322 (9th Cir. 1973).

Pandering is an important consideration in an obscenity case and similar evidence should be used to make a determination of whether an item constitutes child pornography.

3. Evidence of Pandering is Relevant and May Be Decisive to the Question of Child Pornography

Knox's conduct shows that he intentionally brought his activities and the material at issue within the legitimate reach of the child exploitation statute. These child depictions were "pandered" as clearly as Ralph Ginzburg pandered his otherwise non-obscene material into the reach of the obscene mailing statute.

The child exploitation statutes are intended by Congress, as evidenced by the plain meaning of the statutes read as a whole and as discussed earlier, to prevent and prohibit the exploitation of minors for sexual purposes. Applying the pandering principle is a proper and established method for courts to determine whether the defendant should be convicted by focusing on the conduct of the defendant as "pornographer", "child pornographer", "sexual-exploiter", or "pedophile". Whatever legitimate uses there may ever be as to some forms of child nudity or sexual depictions, see *New York v. Ferber*, 458 U.S. 747, 775 (1982) (O'Connor, J., concurring), Knox's intentional pandering of children's panty-clad sexual organs cannot fit that possible exception.

In this regard, employing the pandering rule, when presented with "borderline" material, prevents innocent persons from being brought within the statute by requiring that guilty defendants be shown to have intended to exploit

the sexual aspect of the materials. Pandering analysis therefore acts in a manner that narrows construction of the child exploitation statute by allowing proof of intended sexual exploitation of a minor to eliminate any claims of innocent or serious value purposes.

In this case, the material pandered to, and defendant responded to, the lasciviously child–erotic ("prurient") interest in child sexuality or pedophilia, every bit as much as Ginzburg pandered to the voyeuristically erotic adult interest in titillation over adult sexuality with his non–mailable pornography. *Ginzburg*, 383 U.S. at 470. Under the specific facts of this case, these "peeping tom" views into the private areas of minors are well within the legitimate scope of this federal statute because they clearly are intended to exploit these minors in the sexual way that Congress and the courts have long recognized as harmful to the best interests of children.

4. The Record is Replete with Evidence of Pandering

The circuit court found, and there can be no serious dispute otherwise, that "the video tapes clearly were designed to pander to pedophiles." *United States v. Knox*, 977 F.2d 815, 817 (3rd Cir. 1992). The court further noted that:

> The catalogs described in detail the contents and intended effect of the films that could be purchased:
>
> "'Sassy Sylphs' will blow your mind so completely you'll be begging for mercy. Just look at what we have in this incredible tape: about 14 girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy. There are panties showing under shorts and under dresses and skirts; there are boobs galore and T-back (thong) bathing suits on girls as young as 15 that are so revealing it's almost like seeing them naked (some say even better)."

Id. at 818.

Not only were the tapes advertised and promoted for their titillating nature to Knox, but Knox used them for that purpose -- for sexual arousal of his pedophilic tendencies:

For instance, on the Nather II tape, Knox wrote

> "13–year old flashes" followed by "hot". Knox characterizes the second vignette as "15 year old shows nipple." Both Nather's and Knox's descriptions of the tapes clearly demonstrate that Knox was aware that the videotapes contained sexually oriented materials designed to sexually arouse a pedophile. Sufficient evidence was presented at the bench trial to support a finding that Knox was aware of the nature of the Nather tapes, and therefore knowingly possessed and received them.

Id at 825.

Knox's own conduct, and the circumstances of distribution and advertising, compel a finding that these tapes are child pornography. That the distributor, Nather Company of Las Vegas, claimed these tapes were "completely legal" is of no import. Just as Ginzburg's circulars claimed to be legal and "the result of recent court decisions", *Ginzburg*, 383 U.S. at 468, fn.9, the exploiter's self–classification is not significant. Knox knew he was walking a fine line. The mere fact that Nather stressed the legality of its tapes in its newsletters, which were found in Knox's apartment, put Knox on notice that such an assertion

was doubtful:

> Additionally, relying on Nather's disclaimer is tantamount to asking a hard core pornographer for legal advice as to whether the material he earns a living by selling is legal. Nather's disclaimer could not reasonably lead Knox to believe that the videotapes were legal. If anything, the need to profess legality should have alerted Knox to the films' dubious legality.

977 F.2d at 825.

To grant these kinds of materials constitutional protection merely ensures that thousands of children will continue to be victimized, both by being depicted in this manner, and by potentially becoming victims of a sexually aroused child molester. There will be no way to prevent sexually provocative depictions of scantily clad young girls and boys, with cameras focusing in on genital and pubic regions, from being traded in the marketplace. The worthy effort to prevent child sexual exploitation by drying up the market for child pornography used by pedophiles, which was so eloquently defended by this Court in *New York v.*

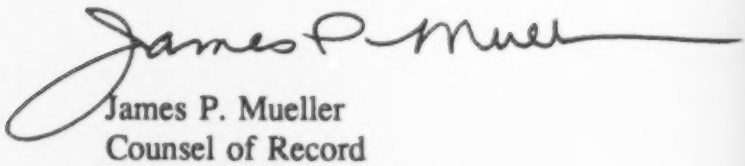
Ferber, would be significantly undercut by a reversal of pedophile Steven Knox's conviction.

CONCLUSION

For the above-stated reasons, the decision of the Court of Appeals should be affirmed.

Dated September 2nd, 1993.

Respectfully Submitted,



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APPENDIX A

I HEREBY CONSENT to the filing of an *amicus curiae* brief by the National Family Legal Foundation in support of the respondent, United States, in the case *Stephen A. Knox v. United States*.

DATE: 7/28/93

Attorney of Record for Petitioner

U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

July 29, 1993

James P. Mueller
Legal Counsel
National Family Legal Foundation
5353 North 16th Street
Pheonix, Arizona 85016

Re: Stephen A. Knox v. United States, No. 92-1183

Dear Mr. Mueller:

This is in response to your letter of July 20, 1993.

On behalf of the United States I hereby consent to the filing of a brief as amicus curiae on behalf of the National Family Legal Foundation in the above case.

Sincerely,

Drew S. Days, III/ecs

Drew S. Days, III
Solicitor General

NO. 92-1183

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN A. KNOX, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

BRIEF OF NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, THE NATIONAL PARENT TEACHER ASSOCIATION, NATIONAL COALITION AGAINST PORNOGRAPHY, "ENOUGH IS ENOUGH!", NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, NATIONAL CHILDREN'S ADVOCACY CENTER, CHILD WELFARE LEAGUE OF AMERICA, AMERICAN COALITION FOR ABUSE AWARENESS, FOCUS ON THE FAMILY, FAMILY VIOLENCE & SEXUAL ASSAULT INSTITUTE, FAMILY RESEARCH COUNCIL, INC., MOVING FORWARD, INC., NATIONAL CENTER FOR REDRESS OF INCEST AND SEXUAL ABUSE, HELP US REGAIN THE CHILDREN, VOICES IN ACTION, INC., AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT.

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INTEREST OF THE AMICI CURIAE*

Amici comprise a broad collection of public interest groups whose membership include the survivors of childhood sexual abuse and professionals who expend considerable energy advocating legal and social reforms to protect children. Amici, while representing diverse political perspectives, agree that this Court's decisions in the present case will directly impact the safety and well-being of children. For the Court's convenience, Appendix B contains a full description of the Amici.

SUMMARY OF THE ARGUMENT

The existence of child sexual abuse is a tragic commentary on the status of children in contemporary American society. Children who have been sexually abused are often maladjusted and frequently suffer from a myriad of harmful after-effects. Accordingly, this Court and numerous other courts have identified the protection of children from child sexual abuse as a particularly compelling interest. *New York v. Ferber*, 458 U.S. 747, 756 (1982). Furthermore, this Court has recognized that child sexual abuse includes acts of sexual exploitation such as displaying a child for the sexual gratification of adults.

It is obvious that the material at issue in the present case display children for the sexual gratification of pedophile consumers (i.e., persons, such as the Petitioner, who are afflicted with a sexual pathology characterized by a sexual attraction to children.) Indeed, the "Nather Notes", which are the Nather company's promotional materials, make clear that the Nather Tapes are intended to arouse the viewer's sexual

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* This brief is submitted with the written consent of both parties, filed with the clerk of this Court.

passions. Because most of the children depicted in the Nather Tapes are apparently unaware of the use to which their images are put, the production as well as the repeated viewing of these videotapes constitute child sexual abuse.

Pedophiles harm children by utilizing sexually suggestive depictions such as the Nather Tapes as an aid in the commission of sex crimes. First, pedophiles use such images to stimulate their sexual desires. Scholarly research has documented a direct link between pedophilic sexual stimulation via images of children and child sexual abuse. Second, as this Court has recognized, pedophiles use these sexually suggestive images to lower the inhibitions of other children in order to lure them into sexual relationships. To borrow a phrase from the Petitioner, "it is beyond obvious" that sexual relations between children and adults constitute child sexual abuse. The Nather Tapes, and other similar tapes, provide erotic inspiration to the child sexual abuser and facilitate the transformation of pedophilic fantasy into child sexual abuse.

In the context of the first amendment, this Court's decisions reflect a careful and studied analysis of the practical consequences of a particular course of action. Accordingly, in any analysis of the legal and equitable issues in the instant case, this Court must consider the likely response of pedophiles and those who pander to them.

In the instant case, Petitioner asks this Court to shackle the government's efforts to protect children from filmed or photographed sexual abuse if the children are clothed or partially clothed while being abused. Clearly, however, child sexual abuse is as pernicious whether the child is clothed, partially clothed, or nude.

Petitioner's argument also ignores the function of the Nather Tapes as effective tools in the seduction of children. Amici submit that so impeding the government's ability to enforce 18 U.S.C. § 2256 will provide pedophiles with a "backdoor" opportunity to seduce and abuse children. This "backdoor" opportunity will spawn a "backdoor child pornography" industry that will seek out and victimize children.

Petitioner urges this Court to adopt a counterintuitive definition of the term "exhibit." Brief for Pet. at 15. However, established canons of statutory construction require this Court to define "exhibit" in common sense terms. Accordingly, this Court should reject any definition of exhibit which presupposes nudity. Such a definition offers pedophiles too many opportunities to abuse children.

Since this Court decided *Ferber*, child pornography has been driven underground and has not been widely commercially available. If Petitioner's conviction is overturned, there is every reason to believe that sexually suggestive depictions of children will become more widely available in such venues as cable television, neighborhood convenience stores, and video rental stores. Furthermore, new video producers will enter the "backdoor child pornography" market. This increased competition will fuel greater demand for sexually suggestive depictions of children, including traditional forms of child pornography.

The new, more competitive market for "backdoor child pornography" will require additional child models who will be aggressively pursued by "backdoor child pornography" producers. These new models will unquestionably be displayed for the sexual gratification of pedophiles such as Petitioner, which is itself a form of child sexual abuse. Research data indicate that viewing the sexually suggestive

images available in the "backdoor child pornography" market will encourage pedophiles to molest children.

Finally, in order to increase their share of the market, "backdoor child pornography" producers will present ever more graphic and explicit images of children in their videotapes. None of the consequences of overturning Petitioner's conviction bode well for children.

Today, a cold wind threatens to rush through America and spread further a malaise called pedophilia. This Court has an historic opportunity to stand between that wind and America's children. In a society where children fall prey to sexual predators, the state must be allowed to prevent the sexual victimization of children. If this Court overturns Petitioner's conviction, it will unleash Nather and like-minded companies to prey upon the children of an unsuspecting public.

The first amendment should not be a portal through which America's children are lured into degradation and humiliation.

ARGUMENT

I. EVIDENCE CLEARLY REVEALS THAT CHILD PORNOGRAPHY DIRECTLY CONTRIBUTES TO CHILD SEXUAL ABUSE.

A. Child Sexual Abuse Occurs When a Child Is Used or Displayed for the Sexual Gratification of an Adult.

Child sexual abuse has been defined as "[c]ontacts or interactions between a child and an adult when the child is being used for the sexual stimulation of that adult or another

person."[1] At least one researcher explicitly distinguishes between "contact" forms of child sexual abuse, such as actual intercourse with a child, and "non-contact" forms of child sexual abuse, such as exhibitionism or voyeurism.[2]

This Court, and several circuit courts of appeal, have accepted an expansive definition of child sexual abuse and observed that child sexual abuse may occur without contact between the child and the offender, such as in the case of child pornography.[3] *Osborne v. Ohio*, 495 U.S. 103, 110 (1990) (state has an important interest in protecting the "victims of child pornography"); *Ferber*, 458 U.S. at 774-75 (1982) (O'Connor, J., concurring); *see United States v. Andersson*, 803 F.2d 903, 907 n.3 (7th Cir. 1986), *cert. denied*, 479 U.S. 1069 (1987) (labeling child pornography as a form of sexual abuse). In *United States v. Arvin*, the Court observed that §§ 2252 and 2256 "[r]eflect a legislative determination that *it is a form of child abuse for a photographer to pose a child sexually for purposes of the photographer's sexual gratification*, and that the abuse continues with the dissemination of the photos for purpose of satisfying others." 900 F.2d 1385, 1389 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 594 (1991) (emphasis added).

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[1] R. Kempe and C. Kempe, The Common Secret: Sexual Abuse of Children and Adolescents 10 (1984); *see* B. Coulfield & R. Horowitz, Child Abuse and the Law 1 (1987)(noting that child sexual abuse "may encompass a broad range of activity, including rape, sexual contact, intentional touching, and intentional exposure. It also includes sexual exploitation, such as forcing or soliciting a child to engage in prostitution or pornographic enterprises.")

[2] *See*, David Finkelhor, *Answers to Important Questions About the Scope and Nature of Child Sexual Abuse*, (to be published in *The Future of Children*)(on file with the National Law Center for Children and Families).

[3] Material is thus classified as pornographic only if it is intended to elicit sexual responses. Webster's New World Dictionary 1051 (3d ed. 1991).

B. Visual Depictions of Children Containing Lascivious Exhibitions of the Genitalia or Pubic Area Elicit a Pedophilic Response and Are Directly Linked to Child Sexual Abuse.

i. Child Sexual Abuse is a Social Problem of Major Proportions Involving the Exploitation of Thousands of Children Annually.

It is indisputable that child sexual abuse is an intractable social problem reaching epidemic proportions in the United States.[4] *See* H.R. Rep. No. 910, 99th Cong., 2d Sess. 3, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5952, 5953 ("there may be as many as one half-million children and adolescents who are victims of sexual abuse annually")(statement of Senator William Roth). From 1980 to 1986, child sexual abuse increased three fold.[5] However, estimates of actual child sexual abuse greatly exceed 138,000.[6] Furthermore, it has been estimated that "one in three females and one in ten males will be sexually molested before the age of 18; and four million child molesters [are believed to] reside in this country."[7]

ii. Child Pornography Contributes to Child Sexual Abuse Because Pedophiles Use it To

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[4] *See, e.g.*, Eugene Register-Guard, Oct. 31, 1988, at B1, col. 1 (Oregon's Children's Services Division *confirmed* approximately 12,000 cases of child sexual abuse from 1985-1987).

[5] *See* National Center of Child Abuse and Neglect, Children's Bureau, U.S. Department of Health and Human Services, *Study of National Incidence and Prevalence of Child Abuse and Neglect* (1988).

[6] National statistics showed an increase of 400 percent in child sex abuse reports from 1977-1982. In 1984 alone there were 123,000 reported cases, a 35% increase over 1983. Martin Mawyer, *Silent Shame* 27 (1987).

[7] U.S. Department of Justice, Network News 7 (Fall 1985).

Stimulate Their Sexual Desires, Seduce Children, and Record Child Sexual Abuse.

In order to comprehend fully the likely harmful effects of overturning Petitioner's conviction, this Court should consider the reality of child sexual abuse and its relation to sexually explicit depictions of children. Many have commented that "child pornography is the worst form of child abuse."[8] Thousands upon thousands of America's children have been subjected to the indignity of sexual abuse through pornography. The media of video, photography, and film are fora that have depicted our children engaging in various acts from subtle nudity to blatant sexual participation.

The Court must understand the mind and proclivities of pedophiles. As some scholars have observed, "Once we begin to understand the nature of a pedophile's sexual pathology, a certain logic does emerge regarding their behavior."[9] The Nather Tapes are pornographic to pedophiles because of the ages of the models and the camera's focus on their genitalia. Those who would view the videotapes at issue are sexually aroused by children and derive great satisfaction in fantasizing about sexual liaisons with them.

Social science and law enforcement studies have demonstrated that the child sexual abuser is the pedophile who transmutes these fantasies into reality. A study conducted in Louisville, Kentucky of 1400 child sexual abuse cases clearly demonstrated that a significant number of child sexual abuse cases involve the use of sexually explicit depictions of children. *See The Effects of Pornography on Women and Children: Hearings Before the Subcomm. of*

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[8] William A. Stanmeyer, *The Seduction of Society* 88 (1984)

[9] Daniel S. Campagna and Donald L. Poffenberger, *The Sexual Trafficking in Children* 23 (1988)

Juvenile Justice of the Comm. on the Judiciary of the United States Senate, 98th Cong. 2d Sess. 136-139 (Sept. 12, 1984)(testimony of John Rabun, for the National Center for Missing and Exploited Children)(Committee Serial No. J-98-133). In this study, over 40 major cases, involving 12 or more child victims, were examined in depth. *Id.* **All** 40 cases involved various forms of pornography and in most cases, child nudes and/or child pornography were found in the abuser's home. *Id.*

Law enforcement studies have verified that pedophiles invariably collect visual depictions of children that arouse a pedophilic interest in sex.[10] Detective William Dworin of the Los Angeles Police Department testified before Congress that of the 700 child molesters in whose arrest he had participated, more than half had child pornography in their possession.[11] *See* Perm. Subcomm. on Invest., Child Pornography, and Pedophilia, S. Rep. No. 537, 99th Cong. 2d Sess. 9 (1986) [hereinafter "S. Rep. No. 537"]; *see generally* Donnelly, *Protection of Children from Use in Pornography*, 12 J. Law Reform 295 (1979)(comprehensive discussion of the correlation between child pornography and child sexual abuse).

Other studies have demonstrated that repeated exposure to sexually explicit material involving children is directly linked to child sexual abuse.[12] *See* S. Rep. No. 537 at 8 n.27

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[10] K. Lanning, *Child Molesters: A Behavioral Analysis* 17-25 (2d ed. 1987).

[11] *See* Ralph W. Bennett, *The Relationship between Pornography and Extrafamilial Child Sexual Abuse*, The Police Chief (February 1991) 19.

[12] *See, e.g.*, Erickson, *Behavior Patterns of Child Molesters*, 17 Archives Sexual Behav. 77-78 (Feb. 1988)(reporting that large numbers of child molesters use sexually suggestive pictures of children to lower the inhibitions of their victims). To compound matters, there is a

& 28. Child pornography thus plays a central role in the sexual abuse of children. It justifies pedophilic conduct and assists pedophiles in seducing children.[13] This Court has recognized that relationship. *Ferber*, 458 U.S. at 759-60.

Enlightened by the forgoing studies and additional testimony, Congress recognized that viewing sexually suggestive pictures of children is related to child sexual abuse and other forms of sexual aggression. *See* S. Rep. No. 537 at 6. In the present case, however, a new form of child pornography, "backdoor child pornography," is before the Court. This new form of child pornography poses the same danger to children as traditional child pornography. *Knox*, 977 F.2d at 821.

II. THE CONTENTS OF THE NATHER TAPES DISPLAY THE GENITALIA OF CHILDREN IN A MANNER CALCULATED TO EXCITE PEDOPHILIC LUST.

An examination of Nather Tapes Two and Three reveals that they were intended to appeal to pedophiles' interest in

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demonstrable link between sexual abuse as a child and criminal behavior as an adult. Burgess, *Abused to Abuser: Antecedents of Socially Deviant Behavior*, 144 Am. J. Psychiatry 1431-36 (Nov. 1987).

[13] *See* Lanning, *supra*, at 18 ("Child pornography exists primarily for the consumption of pedophiles. If there were no pedophiles, there would be little child pornography other than that involving adolescent children."); *see also* W. Marshall, *Use of Sexually Explicit Stimuli by Rapists, Child Molesters and Non-offenders*, 25 J. of Sex Res. 267-288 (1988). The increased occurrence of child sexual abuse has given rise to what researchers refer to as the cycle of child victimization. National Center for Missing and Exploited Children, *Child Pornography and Prostitution* 2-3 (1987)

sexual relations with minors.[14] While this section discusses only a portion of the tapes, it is representative of their contents as a whole.

Nather Tape Two ("Nath. 2") opens with images of a clothed adolescent female striking suggestive poses and responding to off-camera directions. Nath. 2 at 1:00-1:48 (Government's Exhibit 6; R.59, 60). While the female is posing, the camera focuses on her pubic area a number of times. *Id*. Later in Nath. 2, the camera focuses on the panties of a young, early adolescent or pre-teen female. *Id*. at 4:40 & 6:14 & 6:54.

At one point in Nath. 2, an adolescent female says to someone off-camera, "I don't know what to do." Nath. 2 at 8:50. An off-camera voice asks her to push her knees up. *Id*. The female complies and the camera focuses directly on her panties. *Id*. Another off-camera voice then responds, "We love it." *Id*.

Also in Nath. 2, a pre-teen female is depicted in a tree holding a squirming younger female; both are clothed. Nath. 2 at 26:46. The camera focuses on the panties of the older child numerous times. The younger child remarks, "My friend did a video and she got five dollars." *Id*. at 29:35.

Later in Nath. 2, a bikini-clad female hangs upside down and her bikini top falls down exposing her nipple. Nath. 2 at 33:34. The camera quickly focuses in on the exposed nipple. *Id*. The camera focuses on the female's pubic area numerous times. *Id*.

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[14] Because at the time of this writing the government's copy of Nather Tape One was not functioning properly, Nather Tape One will not be discussed. For the convenience of the Court, a more detailed outline of Nather Tapes Two and Three is set forth in Appendix A .

Nather Tape Three ("Nath. 3"), opens with an extended close-up shot of a female's genital area. Nath. 3 at 1:00-3:00 (Government's Exhibit 7; R.59, 60). Later in Nath. 3, a female is instructed by an off-camera voice to "pull your pantyhose down." Nath. 3 at 38:00. The female complies and the camera focuses on her garter as well as her pubic area. *Id.*

III. AN EXAMINATION OF THE "NATHER NOTES" CLEARLY SUPPORTS THE RESPONDENT'S POSITION THAT THE VIDEOTAPES CONTAIN LASCIVIOUS EXHIBITIONS OF THE GENITALIA AND ALSO DEMONSTRATES THAT PEDOPHILES CONSIDER THE NATHER TAPES TO BE LASCIVIOUS.

In the context of obscenity, this Court observed that the manner in which allegedly obscene material is marketed is a relevant factor when determining whether this material appeals to a prurient interest in sex. *See Pinkus v. United States*, 436 U.S. 293, 303 (1978). *Pinkus* recognizes that the trier of fact in an obscenity prosecution must be permitted to consider subjective intent the seller and purchaser. Similarly, it is necessary to consider evidence of subjective intent of the seller and buyer when making a lasciviousness determination in a child pornography prosecution.

In this respect, it is crucial for the Court to understand that the production, distribution, and receipt of child pornography are accomplished by pedophiles. Because each of the persons involved view children as sexual objects, they react much differently to videotapes such as the Nather Tapes than would a non-pedophile. This is significant because non-pedophiles consider only the close-up shots of the genitalia to be the critical issue, while the purchasers of the videotapes find *the entirety* of the tapes to be provocative and sexually stimulating.

By examining the distributor's own words it is possible to grasp the allure the video has for the pedophile:

> **"We do not have any filler material in these videos...Every second is crammed with tender young girls in various revealing outfits."**
> Nather Notes, (February 1990), at Government's Exhibit 4 (R.50, 60).

The distributor also understands that the close-up "crotch shots" distinguish the Nather Tapes from innocuous videotapes that may be taken by proud parents. In a promotional release from the Nather Company for April 1990, the distributor, in several places, says, "We have some nice close-ups of the panties she's wearing under those shorts, too." and, "Then, just as you are recovering from all of the above, we bombard you with some nice teen and pre-teen panty close-ups." and finally, "she is a tease and erotic beyond belief and our famous close-ups are absolutely savage." Nather Notes, (April 1990), at Government's Exhibit 4.

Catering to the wishes of its clientele, Nather produced a tape entitled *Early Adolescence* and promoted it as an "answer to the many requests we had been receiving for tapes that had almost exclusively candid panty shots." Nather Catalogue, p. 3, at Government's Exhibit 4. These quotations demonstrate that there is more to these videotapes than merely images of nice young children. The "more" is what distinguishes the Nather Tapes as a form of child pornography and demands that the Petitioner's conviction be upheld. It is impossible to ignore the blatant sexual overtones and dangerous to assume that covered means non-lascivious.

The distributors found what they perceive to be a loophole in § 2256, "[b]est of all, this tape is completely legal, there is absolutely no sex or nudity anywhere, so it is safe to ship, own and trade." Nather Notes, *Bulletin! New "Young" Video Release, "Sassy Sylphs,"* at Government's Exhibit 4. Note, however, that despite the assurance to the contrary, the videotapes do in fact contain sexually suggestive depictions and partial nudity. For example, the videotape labeled Nather Tape Two contains several seconds of the nude breast of a teenage girl. Similarly, in Nather Tape Three, a young girl is "made-up" to look considerably older than her years and poses in "come hither" postures designed to be seductive.

Further examination demonstrates that the distributors and the purchasers know that the videotapes contain lascivious exhibitions of the genitals or pubic areas. In the Nather Catalogue, a tape entitled "*Lollipops*" is promoted by saying, "scenes of a thirteen year old in a leopard skin bikini with a magnificent ass that she puts on *display* for you as she walks back and forth slowly and teasingly."(emphasis added) Nather Catalogue, p. 2, at Government's Exhibit 4.

Incredibly, Petitioner asserts that if the Nather Tapes are found to contain lascivious exhibitions then, "[p]arents will have to take care when photographing their children playing dress-up where the clothing will surely be *inappropriate* and where the children might strike alluring poses..." Pet. for Cert. at 27. Parents do not, as a regular course of conduct, photograph or videotape the genitals or pubic areas of their children. Even if they did snap such a picture or pass their lens over the genitals they would not linger so as to produce close-ups that are "savage." Any reasonable person viewing the tapes and reading the promotional material must conclude that the videotapes contain lascivious exhibitions.

IV. THE NATHER TAPES INCLUDE LASCIVIOUS EXHIBITIONS OF THE GENITALIA OF MINORS IN VIOLATION OF §§ 2252 AND 2256.

A. The Courts Below Correctly Concluded that Lasciviousness Under §§ 2252 and 2256 Must be Defined in the Context of Pedophilia.

In the court below, the Third Circuit correctly concluded that the clothed genitalia of minors may be exhibited lasciviously in violation of 18 U.S.C. § 2256 even where the genitalia is not clearly visible. *Knox*, 977 F.2d at 821. Amici contend that this construction of § 2256 was correct. *Cf. People v. Walcher*, 515 N.E.2d 319, 323 (Ill. App. 4 Dist. 1987)(upholding a state child pornography conviction where the genitals of minor female were "exhibited or displayed ... *albeit* in a somewhat obscured manner.")(emphasis in original).

To reach its conclusion, the Court below recognized that a lasciviousness determination necessarily requires the Court to inquire into the intended effect of the material at issue. *See Knox*, 977 F.2d at 823 ("Whether a depiction is lascivious is essentially a *subjective inquiry* into whether or not the material is intended to elicit a sexual response from the viewer.")(emphasis added). The approach of the Third Circuit is consistent with precedent. *See Knox*, 977 F.2d at 81-22 (citing to *United States v. Villard*, 885 F.2d 117 (3rd Cir. 1989)); *see also United Sates v. Dost*, 636 F. Supp. 828, 831 (S.D. Cal. 1986)(articulating six-part test), *aff'd sub nom. United States v. Weigand*, 812 F.2d 1239 (9th Cir. 1987), *cert. denied*, 484 U.S. 856 (1987). As the Ninth Circuit noted in *Weigand*, the term lascivious as used in § 2256 should be defined within a "social, cultural, and moral context." *Weigand*, 812 F.2d at 1244. Accordingly, the *Weigand* Court observed that lasciviousness in the context of

§ 2256 is a characteristic "of the exhibition [or the visual depiction] which the photographer sets up for himself or like-minded pedophiles." *Id*; *see also Arvin*, 900 F.2d at 1391 ("motive of photographer" a factor in lasciviousness determination). Amici contend that *Weigand* and *Knox* were correct in this regard and that this Court should consider whether the videotapes in the instant case are lascivious in the eyes of pedophiles, who are clearly the intended audience.

B. The Plain Meaning of § 2256 Does Not Require Nudity for an Exhibition of a Child's Genitalia to be Lascivious.

It is appropriate and correct for this Court to read § 2256 and Webster's Dictionary in conjunction to ascertain the meaning of the phrase lascivious exhibition. *See United States v. Knox*, 977 F.2d 815, 819 (3rd Cir. 1992)(observing that when interpreting a statute, the starting point is always the language of the statute itself and citing *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)). Further, this Court must presume that Congress expressed its legislative intent through the ordinary meaning of the words it chose to use. *See Richards v. United States*, 369 U.S. 1, 9 (1962).

In the present case, Petitioner has been convicted for receiving visual depictions of minors whose genitalia are suggestively displayed. Webster's Dictionary defines lascivious as "tending to excite lustful desires."[15] Furthermore, Webster's Dictionary defines exhibit as "to present or expose to view; show; display."[16] Thus, it is

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[15] Webster's New World Dictionary at 761.

[16] Id., at 476 (3d ed 1991)

logical for this Court to define lascivious exhibition as a "display or showing" that tends to arouse "lustful thoughts."

Moreover, this Court must reject the argument that the phrase "lascivious exhibition" as interpreted by the Third Circuit is unconstitutionally vague. *See* Brief of *Amici Curiae* in Support of Petitioner at 22-23. This argument ignores the obvious. As this Court noted in *Ferber*, the government has "greater leeway" in proscribing sexually suggestive depictions of children because of society's interest in safeguarding their health and well-being. 458 U.S. at 756. Furthermore, the Court in *Ferber* explicitly recognized that this Court has often sustained laws "aimed at protecting the physical and emotional well-being of children *even when the laws have operated in the sensitive area of protected rights.*" 458 U.S. at 757 (emphasis added).

If the government has more freedom to proscribe sexually suggestive visual depictions of children than it has to proscribe obscenity, it follows that the government need not enact laws that are more definite than the present obscenity laws. Moreover, this Court did not impose on the government a requirement of "hyper-specificity" in the context of child pornography. *Ferber*, 458 U.S. at 764 (government must "suitably" define proscribed conduct). Thus, the government must merely define in some fashion the phrase "sexual conduct," of which lascivious exhibitions are a sub-category. The Third Circuit's interpretation of lascivious exhibition is suitably limited because, as was noted below, few "images where a minor's genital area is not fully exposed will constitute a lascivious exhibition." *Knox*, 977 F.2d at 823.

C. The Nather Tapes Contain Lascivious Exhibitions of the Genitalia Because They Satisfy the Test for Lasciviousness Set Forth in *United States v. Dost.*

Briefly, the six-factor *Dost* test, as construed by the Third Circuit panel, asks whether the focal point of the depiction is on the genitalia or pubic area; whether the visual depictions contain children posed in a sexually suggestive manner or located in a place associated with sexual activity; whether considering the age of the child, the child is depicted in an unnatural pose or in inappropriate attire; whether the child is fully clothed, partially clothed, or nude; whether the depiction suggests coyness or a willingness to engage in sexual activity; and whether the depiction is intended to arouse a sexual response. *Knox*, 977 F.2d at 822. According to the Court, no single factor is dispositive. *Id.*, at 823. Thus, total or partial nudity is one of several criteria for determining lasciviousness.

This Court's decision in *Ferber* is also instructive with respect to applying the six *Dost* factors. While articulating the constitutional test for child pornography and distinguishing it from the constitutional test for obscenity, this Court held that sexually explicit visual depictions of children need not be "considered as a whole." *Ferber*, 458 U.S. at 764. Accordingly, a single image intended to engender pedophilic lust is sufficient to establish lasciviousness, notwithstanding a barrage of non-lascivious images contained in the same videocassette. The presence of one depiction in the Nather Tapes which satisfy some or all of the *Dost* factors is therefore sufficient to support a lasciviousness determination. Similarly, the presence of various images, each satisfying an independent *Dost* factor, may be considered together when making a lasciviousness determination. The *Ferber* decision supports the Third Circuit panel's observation that lascivious exhibitions need not contain nudity.

i. The Nather Tapes Graphically Focus on the Genitalia of the Subjects.

As previously discussed and set forth in Appendix A, Nath. 2 and Nath. 3 continually focus on the genitalia of the subjects. Indeed, the entire purpose of both tapes was to provide pedophiles with sexually arousing images of young girls. *See, e.g.*, Nather Notes, (February 1990) at Government's Exhibit 4. There can be little doubt that the Nather Tapes satisfy the first *Dost* factor.

ii. For Pedophiles, the Nather Tapes Display Children in Eroticized Settings.

Because lasciviousness should be examined in the context of pedophilic voyeurs, this Court should view visual images of young girls in playgrounds, schools, and swimming pools as would a pedophile. *See, e.g.*, Nath. 2 at 33:34 (female in playground). Pedophiles associate these settings with children, whom, to pedophiles, are highly eroticized sexual objects.[17] It therefore follows as a matter of course that viewing videocassettes of the genitalia of young girls in these settings permits the pedophile to fantasize about sexual encounters with them.

iii. The Children Depicted in the Nather Tapes Are Unnaturally Posed.

At one point in Nath. 2, a young girl states that she does not know how to pose. Nath. 2 at 8:50. She is instructed to position herself so that the camera can focus on her panties. *Id*. This incident reveals that the subject was too young to comprehend what was happening and her poses should be

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[17] *Cf.* Lanning, *supra*, at 20-21 (documenting interest of pedophiles in objects associated with children).

considered unnatural. Were her poses natural, she would have known how to position herself without instruction.

iv. Many of the Children Depicted in the Nather Tapes are Partially Clothed.

While many of the young girls in Nath. 2 and Nath. 3 are depicted in bathing suits or other forms of "abbreviated attire," none is nude. *See Knox,* 977 F.2d at 817. As the Third Circuit correctly observed, Congress explicitly chose not to require nudity as an element of a violation of § 2252. *Id.*, at 820-21. It is therefore appropriate to consider visual images of scantily clad girls, as in the Nath. 2 and Nath. 3, as evidence of lasciviousness.

v. The Nather Tapes Display Children in a Manner Suggesting Coyness and a Willingness to Engage in Sexual Activities.

At one point in Nath. 2, a child, responding to off-camera directions, pulls a strap down and over her shoulder and gazes at the camera seductively. Nath. 2 at 11:10. The sexual overtones of this image are undeniable. Petitioner cannot credibly contend that this image does not invite pedophiles to fantasize about sexual relations with the child.

vi. The Nather Tapes Are Intended to Elicit Sexual Responses.

Both Nath. 2 and Nath. 3 contain visual images of scantily clad girls in suggestive poses. In view of the fact that these videotapes were pandered to pedophiles, it is clear that they were intended to arouse pedophilic sexual desires. Furthermore, the children are exhibited in an erotic, sexually-charged manner. Indeed, given the tendency of pedophiles to be aroused by non-explicit images of children, the conclusion

that the Nather Tapes were intended to appeal to a pedophilic interest in sex is unavoidable.

V. OVERTURNING PETITIONER'S CONVICTION WILL RESULT IN INCREASED CHILD SEXUAL ABUSE AND CHILD SEXUAL EXPLOITATION.

A. First Amendment Precedent Compels the Court to Conclude that the Government's Interest in Protecting Children from Sexual Victimization Justifies A Prohibition on Depictions of Partially-Clad Children Engaged in Sexual Activity.

Amici submit that the rationale enunciated in *Va. Pharmacy Bd. v. Va. Consumer Council* - that the Court should take into account the interests of society when resolving first amendment controversies - is applicable to the instant case. 425 U.S. 748, 765-66 (1976). In *Va. Pharmacy Bd.*, this Court held that so-called commercial speech warrants protection against government intrusion because of the practical benefits that would accrue to society from extending such protection. *Id.* Specifically, this Court noted that "the free flow of information" is necessary for the furtherance of individual and societal interests. *Id; cf. Lee v. Weisman*, 112 S. Ct. 2649, 2659 (1992) (judiciary has a duty to examine the likely effect of its rulings and to "[r]each past formalism.").

It is incontrovertible that society has an interest in protecting the welfare of America's youth. *Ferber*, 458 U.S. at 757 (interest is evident "beyond the need for elaboration"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)(interest is "compelling"); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)(development of society dependent on "healthy, well-rounded growth of young people"). Furthermore, this Court has held on numerous occasions that

society's interest in protecting children outweighs the first amendment rights of adults when the two are in clear conflict. *See Ferber*, 458 U.S. at 757; *Prince*, 321 U.S. at 164-65; *Ginsberg v. New York*, 390 U.S. 629, 636 (1968); *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978)(protection of children justifies proscription on indecent broadcasts notwithstanding the first amendment rights of adult viewers and listeners); *Arvin*, 900 F.2d at 1388 (state has "broad legislative authority" to protect children from abuse). This Court should therefore rule that the safety and well-being of America's children outweigh the right of pedophiles[18] to receive and view depictions of partially-clad children displayed in a sexually suggestive manner.

The consequences of overturning Petitioner's conviction can be identified. Initially, the number of Nather-like videotapes will increase dramatically because there is a strong demand for this type of material in the pedophile community. This increase implies, of course, that a greater number of children will be used as models. Research on the behavior patterns of pedophiles indicates that the sexual abuse of the child models used in "backdoor child pornography" will become more intrusive.[19] Research on the behavior patterns of pedophiles further indicates that easily accessible "backdoor child pornography" will put other children at risk and lead to an increase in all forms of child sexual abuse.[20] Finally, "backdoor child pornography" producers will seek to best one another by marketing videotapes which contain images that are more sexually

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[18] All pedophiles are not child molesters and all child molesters are not pedophiles. A child molester may sexually abuse children due to simple availability, to avoid sexually transmitted diseases, or out of curiosity. On the other hand, pedophiles may not act out their sexual fantasies. Lanning, *supra*, 1-3.

[19] *See*, Erickson, *supra*, at 77.

[20] Id.

explicit. Under the *Va. Pharmacy Bd.* rationale, this Court should reject the Petitioner's argument that pedophiles have a first amendment right to view sexually suggestive depictions of children in light of the harm that such depictions pose to society.

B. Reversing Petitioner's Conviction Will Legitimize the "Backdoor Child Pornography" Market and Permit it to Expand and to Fuel Demand for Sexually Suggestive Depictions of Children.

As indicated by the Nather Notes of March and April 1990, "[t]hese legal videos featuring teen and pre-teen girls have proven so popular that not only have they been widely pirated in this country and abroad, they have also, recently, spurned [sic.] quite a few competitors." Nather Notes, (March 1990, April 1990) at Government's Exhibit 4. If this Court rules that lingering "crotch shots" of little girls are protected expression, a wave of new producers will follow.

It is clear that a huge market exists for pedophilic material.[21] Any relaxation of the protection provided by *Ferber* and *Osborne* will lead to a large and vital market for child pornography that will victimize children. *See* S. Rep. No. 95-438, 95th Cong., 2d Sess. 5. One observer has noted that "[n]o matter how adequate the laws are, how aggressively they may be enforced by police, prosecutors, and the courts...there will always be adults who are anxious to sexually exploit children."[22] By acting responsibly this Court will see, as it did in *Ferber* and *Osborne*, that "it is evident beyond the need for elaboration that a State's interest in safe guarding the physical and psychological well-being of a minor is compelling." *Ferber*, 458 U.S. at 756.

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[21] Shirley O'Brien, *Child Pornography* 301 (1983)

[22] *Id.*

The Petitioner ordered and received the Nather Tapes, thereby sending a message to the distributors to continue producing such videotapes. If this Court fails to affirm the Petitioner's conviction, a flood of similar messages will be sent out by other pedophile consumers. Not only will Nather be free to distribute, but anyone else interested in making money by exploiting children can enter the market. This will put children at greater risk because the producers will undoubtedly approach the outer limits of the ruling. If the Court holds that it is permissible to focus upon the covered genitalia of children the next logical step for the producers is to explore the sufficiency of the covering. How large must it be? How much of the genitalia must be covered? How opaque must the covering be?

C. The Expanded "Backdoor Child Pornography" Market Will Require Additional Child Models and Encourage the Producers of "Backdoor Child Pornography" to Aggressively Recruit Them.

It is logical that an increased demand for Nather-like videotapes, which would be sold openly, requires an increase in models. However, will the purveyors of these videotapes continue to rely on their apparent subterfuge (the staged modeling session) or will they become more brazen when the legality of the material is firmly established? Clearly, if the restraints are removed, and the opportunities for significant financial rewards are abundant, the producers will not hesitate to recruit additional children. Their audience would demand such actions because of the need to increase their private collections.

According to the United States Department of Health and Human Services, about fifty percent of the "runaway population are victims of some sort of commercial sexual

exploitation."[23] It is logical to project that additional children will be lured into a business that, at first, requires no nudity. Unfortunately, those involved in the production of the Nather-like videotapes will expand their activities and some in this expanded group will undoubtedly be involved in other more nefarious segments of the pornography industry.

This proliferation of distributors and producers foreshadows an exponential increase in more intrusive forms of child sexual abuse. Those children that enter the Nather world and reap the benefits will become dependent on the money and gifts involved. When these luxuries are withheld, as they no doubt will be, the children will be asked to perform activities that are increasingly provocative. Each time the line will be extended until some children are forced to participate in more explicit forms of child pornography.[24]

D. The Increased Availability of "Backdoor Child Pornography" and the Increased Sexual Exploitation of Child Models Will Dramatically Increase the Number of Sexual Batteries Committed Against Children.

The end result of a flooded marketplace is a frightening prospect. Much of the relevant scientific research on sexual arousal "suggests that acts of child sexual molestation by some...adults *are precipitated if one achieves orgasm via fantasies of sex with children.*"[25] (emphasis added) The horrifying aspect of this thought is that the Nather videotapes will be used by pedophiles to fantasize, achieve orgasm, and

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[23] Campagna, *supra*, at 147

[24] Stanmeyer, *supra*, at 86; *See*, Campagna, *supra*, at 161 ("When legitimate opportunities do not exist, survival for children who lack the support of their family may depend upon entry into a commercial sex market")

[25] Stanmeyer, *supra*, at 9

then engage in actual child sexual abuse. In *Osborne*, this Court observed that, "[i]t is also surely reasonable for the State to conclude that it will decrease production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand." 495 U.S. at 109-10 (1990).

This reasoning is valid in the instant case. By penalizing the Petitioner for receiving the videotapes, the "backdoor child pornography" market will shrink and fewer children will be subjected to abuse. Similarly, the potential for igniting the sexual abuse of a child through masturbatory fantasies decreases as the availability of the material decreases.

E. As Competition in the "Backdoor Child Pornography" Market Escalates, the Depictions of Children in "Backdoor Child Pornography" Will Become More Graphic.

The Petitioner would also have the Court believe that the Nather Tapes are nothing more than, "[d]epictions of minors in bathing suits, leotards, shorts, underwear, and other similar clothing [and] are created every day and may be found everywhere throughout society." Brief of Pet. at 14. Examining the promotional materials supplied by Nather refutes this proposition and demonstrates that these videotapes are not ordinary "everyday" tapes. Even the Petitioner concedes that "the Nather brochure boasted that the viewer would be sexually aroused by the videotapes." Brief of Pet. at 35. In a *Special Anniversary Notice* for March 1990, the Nather company advertises, "a 15 year old doll with braces and a 40 inch bust and ass to match in a swimsuit two sizes too small and some nice *pubic* peeks." Nather Notes, (March 1990), at Government's Exhibit 4. This advertisement, coupled with a February 1990 *Bulletin* from

Nather which reads, "[o]ne of the girls has a bikini borrowed from an older sister...and when she bends over we all get a startling and rather astonishing look at her full 14 year old bush," demonstrates that the producers and distributors of this material have every intention of reaching or exceeding the outer limits of the law. *See* Nather Notes, (February 1990), at Government's Exhibit 4.

Expecting those, such as Petitioner, who purchase this material to be satisfied simply with viewing extended panty shots is also quite naive. As this Court in *Ferber* recognized the need to protect the children stems from "[t]he legislative judgment...that the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the [children]." 458 U.S. at 756. By sanctioning Nather-like videotapes, this Court would subject a significant number of children to sexual exploitation.

One researchers notes that "[c]hildren who pose for pictures begin to think of themselves as objects to be sold, they choke off their feelings of affection and finally respond like objects rather than people."[26] When the subjects of the videotapes in the instant case either discover or face the fact that they have been used the as subjects of pedophilic fantasy, they will think of themselves as objects. Even more horrific is the realization that legalization of these videotapes objectifies the children and makes them likely targets for other forms of pornography. The children in Nather Tapes One, Two and Three are *already* potential participants in more explicit forms of pornography.

It is imperative that the Court understand that "as long as there is a market for child sex there will be men and women

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[26] Stanmeyer, *supra*, at 86

anxious to meet the demand."[27] Any retreat from the solid reasoning of *Ferber* and *Osborne* will produce a long line of people willing to supply pedophiles with "crotch shots" of children. Syndicated columnist Ellen Goodman said it best in a 1977 article for the Los Angeles Times: "This is not a First Amendment issue...It is a matter of protecting the ...lives of young models."[28]

CONCLUSION

From a review of social science studies and relevant judicial opinions, it is clear that child sexual abuse is a term broadly defined. It is equally clear from an examination of the Nather Tapes that they contain depictions of children deliberately posed to appeal to the sexual desires of pedophiles. In short, the producing and viewing of the Nather Tapes constitute a form of child sexual abuse. Additionally, as the research data indicates, the viewing of the Nather Tapes is likely to result in more intrusive, more destructive forms of child sexual abuse such as rape or molestation.

As the *Ferber* Court observed, one of the rationales for proscribing sexually suggestive photographs of children is to facilitate their care and protection, "[which] is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children." 458 U.S. at 757 (citations omitted). It would surely be inconsistent with *Ferber* to extend first amendment protection to the sexual abuse of children simply because the children are clothed during the course of their abuse.

Likewise, it would be inconsistent with *Ferber* to extend first amendment protection to the visual recordation of such

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[27] Clifford L. Linedecker, *Children in Chains* 297 (1981)

[28] Id., at 256 (citation omitted)

child sexual abuse. The Third Circuit was correct when it noted, "[t]he harm Congress attempted to eradicate by enacting the child pornography laws is present when a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles." *Knox*, 977 F.2d at 822.

Finally, as the Nather Notes reveal, there is a budding market for "backdoor child pornography." It is fair to surmise that potential "backdoor child pornography" producers and distributors are poised to exploit this new market if it were to receive first amendment protection. It would be utterly inconsistent with *Ferber* and *Osborne* for this Court to open the door to commercial viability for any form of child pornography. This Court's decision, whatever it may be, will have an enormous impact on the physical and emotional well-being of children. If Petitioner's conviction is overturned and the "backdoor child pornography" industry becomes commercially viable, it is likely that all forms of child sexual abuse will increase. America can ill afford to place children at greater risk of sexual victimization.

On the other hand, if Petitioner's conviction is upheld and the "backdoor child pornography" industry dies in its infancy, this Court will have struck a tremendous blow in favor of children.

Amici therefore respectfully ask this Court to sustain the ruling of the Third Circuit Court of Appeals and affirm Petitioner's conviction.

Respectfully submitted,

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APPENDICES

APPENDIX A

GENERAL OUTLINE OF NATHER TAPES TWO AND THREE

* The numbers listed below reflect the approximate number of minutes and seconds that have elapsed when a given sequence of events has occurred. This is not a complete transcript or listing of the contents of Nather Tapes Two and Three. There are thus other portions of Nather Tapes Two and Three that the Court may consider instructive. Finally, where this outline indicates that voices can be heard, the Court may need to slow the tape and increase the volume.

Tape Two

Timer Count: (minutes: seconds)	**Description:**
1-1:48	Older looking female in suggestive poses; camera focuses on genitalia and pubic area; female is clothed; obviously intended to elicit sexual responses; female responding to off-camera instructions.
4:40, 6:14, 6:54	Obviously early adolescent female; fully clothed; various panty shots, some of which are extended;
8:50	Obviously adolescent female, darker complexion, in short denim skirt; extended panty shots; female says to someone off-camera "I don't know what to do."; off-camera directions

Timer Count:	Description:
	were then given followed by another panty shot; someone off-camera asks to have the knees pushed up closer to the chest after which camera focuses on panties; off-camera voice: "We love it."
11:10	Young female responds to off-camera instructions and pulls strap down over her shoulder and gazes at camera seductively.
14:50, 18:20	Young children receiving directions from off-camera; camera focuses on pubic area; children in sexual poses inappropriate for age.
26:46, 29:35	Two young children - one very young - in tree; children fully clothed; the smallest child squirms and says, "Let me go."; later smallest child remarks," My friend did a video and she got five dollars."; panty shots of older child; audio then dies.
33:34	Female in bikini bathing suit (i.e., partially clothed); camera focuses on pubic area; intended to elicit sexual response; girl hangs upside down; bathing suit top falls and nipple shows - camera focuses on nipple.
39:35, 40:35	Female poses in bathing suit; responding to off-camera directions;

Timer Count:	Description:
	numerous close-ups shots of pubic area.
Tape Three	
1:00-3:00	Extended close-up shots of genital area;
38:00	Female in dress; camera attempts to focus on pubic area under dress; voice off-camera instructs female "Pull your panty hose down."; female complies and reveals garter.
55:46	Younger child; camera focuses on child's genital area

APPENDIX B

INTEREST AND DESCRIPTION OF THE AMICI

The **National Law Center for Children and Families** ("National Law Center") is a Washington D.C. metro based legal center dedicated to the protection of children and the preservation of families though the enforcement of existing laws and the promulgation of new legislation against illegal pornography and sexual exploitation.

Through the legal staff, resource library, and publications, the National Law Center actively participates in assisting courts, prosecutors, investigators, legislators, public officials, researchers, and parents to stop illegal pornography and its concomitant harms of sexual exploitation of children, women, and families.

Consultation with many county, city and civic leaders around the nation allows the National Law Center to assist in the drafting and enactment of new legislation. This legislation concerns obscenity, child pornography, and materials harmful to minors. The National Law Center is also involved in the dissemination of vital information to legislators, law enforcement, public officials and concerned citizens alike.

Seminars, newsletters and updated prosecutors' manuals are part of the National Law Center's strategy. This strategy is dedicated to equipping law enforcement with the necessary information, pleadings, and legal techniques necessary to win the war for our children and families.

The National Law Center has participated in numerous Amici Curiae briefs before this Court, including *Osborne v. Ohio* and *Alexander v. United States*. Presently, the National Law Center is involved in publishing training materials and

reference manuals on child sexual exploitation and pornography. Its legal staff has conducted legal and law enforcement training for thousands of investigators and prosecutors since 1984.

The National Parent Teacher Association ("PTA") is a section 501 (c) (3) non-profit association and the nation's largest child advocacy organization, comprising over 6.9 million members in the United States, the District of Columbia and Department of Defense Schools in Europe and the Pacific. Founded in 1897, the National PTA has long been involved in assuring the health and protection of children and youth working on such issues as child labor laws, quality children's television, family preservation and juvenile justice. As expressed in a resolution passed on "Obscene and Pornographic Materials," the National PTA supports "legislation and the strengthening of existing laws to preclude the use of children in the creation, production and manufacture of obscene and pornographic material."

The **National Coalition Against Pornography** ("N-CAP") was founded in 1983 by Dr. Jerry R. Kirk to respond to the devastating impact of illegal obscenity and child pornography on America. N-CAP holds that these materials have a direct relationship to the skyrocketing incidence of rape, sexual violence and child molestation in the United States. Numerous respected studies confirm this opinion.

With members representing over 50 religious groups, denominations, citizen action groups and foundations, N-CAP works to increase public awareness of the harm caused by obscenity, indecency and child pornography and to implement a number of programs designed to minimize the threat they pose to our society.

These programs include educational/training seminars designed to teach citizens and law enforcement officials how to rid their communities of illegal obscenity and child pornography. Other programs include: victim service development training; legal and law enforcement training on obscenity and child pornography investigations and prosecutions; extensive resource development and distribution, including a wide range of research reports documenting the harm of obscenity, indecency and child pornography; expert testimony for federal and state legislatures that are considering stronger obscenity and child protection laws. N-CAP founder, Dr. Jerry Kirk, provided testimony before both the U.S. House of Representative and the U.S. Senate in support of the Child Protection and Obscenity Enforcement Act of 1988.

Each of N-CAP's programs is active on national basis, with specific involvement in dozens of local cities at any given time. The fundamental mission and purpose of N-CAP is in protecting children through the elimination of child pornography and obscenity, and the restriction of indecency.

The **"Enough is Enough!"** campaign's mission is to greatly reduce sexual violence and to prevent children, women, men and families from becoming victims by eliminating child pornography and removing hard-core and illegal pornography from the marketplace.

This is an educational program with a plan to mobilize America's women. In the battle against the abusive, predatory material that is flooding our nation. Pornography leaves in its wake broken lives and homes, as its chain of abuse victimizes women and their children.

The "Enough is Enough!" campaign includes women from varied backgrounds, professions, religions, non-profit

organizations and political affiliations. This is a campaign with a focused target (that which is illegal), and a diverse, growing constituency. It is a unique effort in that (moderate, liberal and conservative) women are joining together to deal with hate literature which eroticizes inequality and violence, preys upon children and holds a fatal attraction for many men.

Over 30% of the states' First Ladies and numerous other women of influence have become members of the National Committee of Support, and this list is expanding.

The national launch of the "Enough is Enough!" campaign was held November 1992. Since that date, educational meetings and training seminars have been held in cities from Coast to Coast. This campaign is not creating a new organization rather initiating a movement. Local action is on the increase as women are empowered to bring about change. They are encouraged, educated and provided with materials to equip them to succeed in their efforts. Women are investing their influence to change the way America thinks about pornography.

The **National Center for Missing and Exploited Children** (the "Center") is a non–profit, tax–exempt corporation chartered in the District of Columbia in 1984, with goals of decreasing the incidence of crimes against children, effecting positive changes in public law and policy, encouraging an awareness of the significance of all crimes against children, and assisting families and those who seek to protect children. The Center works in cooperation with the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice in coordinating the efforts of law enforcement, social service agencies, elected officials, judges, prosecutors, educators, and the public and private sectors on child protection issues.

The Center has been funded by the Office of Juvenile Justice and Delinquency Prevention since 1984 to implement tasks under 42 U.S.C. §§5771–5777, including operation of the national toll–free hotline for reports of missing children; operation of the national resource center and clearinghouse for prevention, investigation, prosecution, and treatment of the missing and exploited child case; and assistance to OJJDP in performing its task of coordinating federally funded programs related to missing children. The Center actively assists federal and state law enforcement agencies' efforts to reduce the incidence of sexual exploitation, including passing reports of child pornography received on the hotline to agents of the U.S. Customs Service, U.S. Postal Inspectors Service and local police departments for investigation. The Center provides information on specific federal and state statutes and legislation affecting children, including child pornography laws, state missing children clearinghouse, non–profit organizations, and interested child advocates, and training to professionals.

The **National Children's Advocacy Center** ("NCAC") is a non-profit multidisciplinary prevention, intervention and treatment program. It's primary function is to intervene on behalf of and provide services to child victims of sexual or extreme physical abuse. A significant number of its cases involve exploitation of children by out of home perpetrators.

The Children's Center concept is a result of Madison County Alabama's awareness of the critical need to redesign our investigation and intervention system which was revictimizing abused children. The system was forcing these children and non-offending family members from one agency to another, one professional to another, none of whom had specialized training or knowledge of the special needs of child victims. Abused children were subjected to multiple

investigative interviews, and professionals responsible for intervening on behalf of child victims exercised little or no coordination or teamwork.

NCAC's intervention and clinical program, located in a 9-room Victorian style house in Huntsville, Alabama, opened its doors on May 1, 1985, to provide a place where professionals (NCAC's multidisciplinary team) could meet and work and where children could feel safe and comfortable while receiving the services of a comprehensive clinical program offering individual and group therapy for child victims and their non-offending family members.

Since the NCAC opened its doors, thousands of professionals and hundreds of communities across the nation, and several foreign countries, have requested its assistance in improving their response to child physical and sexual abuse. NCAC has grown from a few speaking engagements annually and a National Symposium with 400 participants, to an organized Training and Technical Assistance Program and a national symposium which attracts over one thousand participants annually.

NCAC also serves as the headquarters for the National Network of Children's Advocacy Centers (incorporated in 1990), to further improve the response of communities to child abuse by facilitating the enhancement of multidisciplinary cooperation and coordination, providing high quality/low cost information referrals, consultation, technical assistance, and training and offering opportunities for networking among communities.

Due to the National Children's Advocacy Centers broad national network, and its reputation throughout the world as a leader in this field, the National Center on Child Abuse and Neglect, of the United States Department of Health and

Human Services, has selected the NCAC to operate the only National Resource Center on Child Sexual Abuse (NRCCSA) and National Training Program on Effective Treatment Approaches (NTPETA). The purpose of NRCCSA is to provide technical assistance to all professionals who work with sexually abused children and their families. The purpose of NTPETA is to conduct training on effective mental health treatment for sexually abused children and their families throughout the country.

The **Child Welfare League of America** ("CWLA") is a federation of more than 700 child welfare agencies in the public and voluntary sectors. CWLA is almost three-quarters of a century old and has long been involved in the development of quality program, practice and policy in the field of child welfare, including child protective services. CWLA standards for quality practice address services to abused and neglected children, including children who have been sexually abused. CWLA standards expressly recognize that child sexual abuse includes the exploitation of children and child pornography. CWLA is committed to strong legal protections to ensure that children are not abused through pornographic exploitation and that children are not placed at heightened risk of sexual abuse and victimization by pedophiles as a result of child pornography.

The **American Coalition for Abuse Awareness** ("ACAA") is an ad hoc coalition of individuals and groups committed to resolving the issue of sexual abuse of children. The ACAA has been founded to seek enactment of federal and state legislation establishing the right of a child to be free from sexual victimization, and appropriate protections to assure that such victimization does not occur; enactment of federal and state legislation extending or eliminating statutes of limitations relating to civil lawsuits brought by adult survivors of childhood sexual abuse; formation of a broad based

Coalition to support such legislation; development of public and media awareness of the issue of sexual abuse of children; establishment of a comprehensive network of legal professionals nationwide dedicated to advancing the legal rights of victims of childhood sexual abuse through the justice system; development of educational outreach programs for members of the judicial and legislative branches of government; establishment of a national body to make policy recommendations on issues related to childhood sexual abuse, protection of children, and adult survivors of abuse. Because child pornography both involves and perpetuates the sexual victimization of children, the ACAA supports the respondent in this proceeding.

Focus on the Family is a Christian, non–profit organization committed to strengthening the emotional, psychological and spiritual health of children and their families in the United States and throughout the world. Amicus President, Dr. James C. Dobson, a renowned child psychologist, served on the Attorney General's Commission on Pornography in 1986.

Amicus has produced two major videos, "A Winnable War" and "Fatal Addiction" and assisted in one book *Pornography: A Human Tragedy* which directly discusses the harms of pornography to children, men, women and families in America. The videos and book have been seen and read by thousands of concerned citizens nationwide. Amicus' daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1400 stations. Its monthly magazine has a circulation of 1.85 million. Amicus regularly receives letters and telephone calls from and counsels with families who have children devastated by pornography, molestation and abuse.

Focus on the Family works to preserve and protect the family, and thus has particular knowledge about the impact of child pornography that will be helpful to the Court in this case.

The **Family Violence & Sexual Assault Institute** (FVSAI) was established in 1984 by Robert Geffner, Ph.D. The FVSAI became an independent, nonprofit corporation (501[c][3]) in 1991. The first Family Violence bulletin (FVB), now the Family Violence & Sexual Assault Bulletin (FVSAB), was published in 1985. The FVSAI is a national resource center and maintains an international clearinghouse of references and unpublished papers concerning aspects of family violence and sexual abuse, reviews information and materials, and then disseminates the information in the FVSAB, which is published quarterly and distributed internationally. The overall purposes of these two components of the FVSAI is to improve networking among researchers, practitioners, and agencies, and to disseminate information.

In addition, the FVSAI, in cooperation with crisis centers, agencies, and counseling clinics, is involved in developing treatment programs for spouse/partner abuse and sexual abuse. We have also published two treatment manuals and four bibliographies, and are working on others. The focus of our program's research has been on victims and offenders of spouse/partner abuse and of incest.

The final components of the FVSAI involve training and consultation. We conduct seminars and workshops nationwide, as well as educational programs and conferences. We also serve as consultants to various organizations and agencies, providing program evaluation, research, and technical assistance.

Family Research Council, Inc. is a voice for the pro-family movement in Washington, D.C. and provides policy analysis, legislative assistance and research for pro-family organizations. It also seeks to educate legislators on issues which affect American families. Its research, publications and films on the impact of pornography have been distributed to over 400,000 scholars, organizations and citizens.

The issues in this case directly affect the physical, psychological and emotional well being of children, parents and communities throughout the United States. Family Research Council, Inc. works through legislative assistance and public policy to preserve and protect the family and thus has particular knowledge about the harms of child pornography that will be helpful to the Court in this case.

Moving Forward, Inc. is a non profit 501(c)(3) organization that publishes the news journal *Moving Forward* to educate society about the effects of childhood sexual abuse, and to provide support and information to adult survivors of childhood sexual abuse. We have a 19-member Editorial Advisory Board consisting of nationally and internationally known mental health professionals, authors, social science researchers, college professors, and grass-roots organization leaders.

Moving Forward has an international circulation of 3,000. The news journal is read by an estimated 12,000 people. The publication is the only known news journal for survivors, supportive others, and service providers in the United States. It is distributed through self-help support groups, treatment facilities, religious organizations, public libraries, bookstores, conferences, and individual subscriptions. *Moving Forward* is also frequently cited as a resource in the national broadcast and print media.

Moving Forward's readership has been affected both directly and indirectly by child pornography. Some readers have been direct victims of child pornographers, while others have been forced to view pornographic material either before or while they were being sexually exploited. Child pornography victims suffer a type of victimization that leaves them with profound shame and feelings of violation. We believe that the children and adolescents portrayed in the Nather Tapes are victims of sexual abuse--even if the children are partially clothed and have no been physically touched in a sexual manner. We also believe that child pornography encourages sexual offenders to perpetrate child sexual abuse and that it cannot be tolerated.

The **National Center for Redress of Incest and Sexual Abuse** ("Center for Redress") is a foundation established to address the legal needs of adult survivors and child victims of sexual abuse. Located in Washington, D.C., its purpose is to build a comprehensive network of attorneys across the country who are dedicated to furthering the rights of survivors under the law; to develop educational outreach programs, focusing on members of the judicial and legislative branches of government; to facilitate a national grassroots effort to support projects in progress on the issue of sexual abuse and incest; and to litigate test cases under civil law related to childhood sexual victimization. The Center for Redress believes that the connection between childhood sexual abuse and child pornography has been established beyond doubt, and supports the enforcement of laws aimed at preventing the production and distribution of child pornography, such as the law at issue in this case.

Help Us Regain The Children, a national legal research center and lobbying entity, has had the opportunity to query child pornography and child sexual abuse investigators. We have learned of the inextricable tie between pornography and

pedophilia. We are chagrined to have uncovered state and partially federally sponsored child welfare agencies, such as the OHEL CHILDREN'S HOME AND FAMILY SERVICES, to have actively furnished children under their auspices for a well run child pornography/child pedophilia ring, operated by a Rabbi Avrohom Mondrowitz, who fled to the State of Israel immediately after his indictment in 1987. If the social standards were lowered to condone lascivious poses that involve clothed children, we fear that countless children will become enmeshed in this heinous operation, that can possibly and most ironically be supported by our taxpayer dollar if additional child welfare agencies were to follow in the path of the OHEL agency in Brooklyn, New York.

Child pornography is an ever expanding profiteering enterprise which claims numerous victims. The lowering of our social standards by raising the threshold for what constitutes child pornography (viz., nudity) portends a dangerous consequence to our children in our American society. Not only would our children be subject to execrable activities and opprobrious conduct of posing in a prurient fashion, but such detestable behavior has the propensity to lead to or to inhere acts of child sexual abuse.

VOICES In Action, Inc. is an international organization of survivors and supporters of survivors of incest and child sexual abuse that is dedicated, among other things, to the prevention of incest and child sexual abuse in our society. VOICES is a nonprofit organization headquartered in Chicago, and is the largest membership organization of incest and child sexual abuse survivors in the United States. VOICES' members believe that child sexual abuse is not limited to intercourse, but includes other forms of sexual violation, such as voyeurism, pornography or exhibitionism.

VOICES is strongly committed to ending the traffic of child pornography in all its forms. VOICES therefore urges in the strongest possible terms that this Court affirm the conviction in the court below. The "Nather Tapes" and the associated "Nather Notes" clearly constitute a form of child pornography that is itself a form of sexual abuse perpetrated upon the children who appear in the tapes. Worse, the "voice overs" on these tapes and the associated "Nather Notes" clearly indicate that these child "models" are at high risk to be drawn further into the pornography trade and subjected to still other acts of sexual abuse.